DEC 27 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1928

279
13

No. 159.

JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, et al.,

Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY.

BRIEF ON BEHALF OF APPELLANT, TRANSIT COMMISSION, ON REARGUMENT

SAMUEL UNTERMYER,
IRWIN UNTERMYER,
Counsel.

The Rosin Press, 231 Varick St., N. Y. Tel. Walker 1650.

INDEX.

	PAGE
Opinion of the District Court	1
Jurisdiction of this Court	1
Method of Presentation	2
Statement and Discussion of Facts and Pertinent Legislation in Chronological Order	3
Legislation preceding the Enactment of the Rapid Transit Act of 1891	3
The Rapid Transit Act of 1891	4
Enactment of Chapter 743 of the Laws of 1894 Limiting the Rate of Fare on Certain Elevated Railroads	6
Amendments of 1894 to the Rapid Transit Act	6
Execution of Contracts 1 and 2	9
Lease in 1903 by the Interborough Company of All the Elevated Lines Owned by the Manhattan Company	10
Amendments of 1906 to the Rapid Transit Act	10
The Public Service Commission Law	12
Regulatory or Legislative Powers Vested in the Commission by the Public Service Commission Law	12
Abolition, by the Public Service Commission Law, of the Board of Rapid Transit Railroad Commissioners, and Substitution for that Board of the Public Service Commission of the First District as the Contract Making Body under the Rapid Transit Act with all the Contractual Powers of that Board	18
Amendments of 1909 to the Rapid Transit Act	20
Negotiations Preceding the Execution of Contract 3 and the Elevated Extension Certificate	22

D002-5

PAGE

Institution on February 24, 1912, of Suit by Admiral Realty Company against The City of New York, the Commission and the Interborough Company..... 25

Introduction into the Legislature, on March 18, 1912, of Bill to Amend the Rapid Transit Act with Special Reference to Contract 3 and the Elevated Extension Certificate..... 25

Amendments Enacted on April 19, 1912, to the Rapid Transit Act..... 27

Proceedings in the Admiral Realty Company Case After the Enactment of the Amendments of 1912, and Decision by the Court of Appeals on June 29, 1912, Sustaining the Contracts... 34

Execution of Contract 3 and the Elevated Extention Certificate on March 19, 1913, as Part of the Same Transaction..... 35

Contract 3..... 37

The Elevated Extension Certificate..... 41

Approval by the Board of Estimate and Apportionment of Contract 3 and the Elevated Extension Certificate..... 45

The Interborough Company's Application for an increased Fare on the Subway Lines, made to the Public Service Commission..... 46

Amendments of 1921 to the Public Service Commission Law..... 47

The Interborough Company's application for an increased fare made to the Public Service Commission on March 22, 1922, and the Amendment on that day, of the Public Service Commission Law..... 51

Amendment of 1923 to Section 49 of the Public Service Commission Law..... 54

The Interborough Company's Memorial of 1925 to the Legislature of New York State..... 55

Amendment of 1925 to Article VI of the Public Service Commission Law..... 59

PAGE

Schedules or Tariff Sheets Filed by the Plaintiff on September 15, 1925, Showing Five-Cent Rate of Fare on its Subway and Elevated Lines 59

Proceedings Instituted by the Plaintiff on February 1, 1928, under Section 29 of the Public Service Commission Law to Secure an Increased Fare by the filing of amendatory schedules 62

Letter of February 8, 1928, of James L. Quackenbush to the Commission 63

Letter of February 10, 1928, from the Commission's Special Counsel to the Interborough Company, Protesting Against the use of the City's Funds for expenses incurred in connection with the Company's attempt to break its contract with the City 65

Institution of this Suit by the Interborough Company on the morning of February 14, 1928 67

Decision and Order of the Commission on February 14, 1928, on the Interborough Company's application for an increased fare made after the institution of this suit 68

Institution on February 14, 1928, of three suits by the City and the Commission in the Courts of New York State to require the Interborough Company to perform its contract obligations. 70

The Interborough Company's supplemental complaint, filed March 3, 1928 73

Ancillary Suit Instituted by the Interborough Company in the District Court of the United States 74

Brief Analysis of the Relief Demanded by the Complaint and by the Supplemental Complaint and the Relief Granted by the Order Appealed From 76

The Relief demanded by the Complaint 76

The Relief granted by the Order Appealed from. 78

PART I.

PAGE

JURISDICTION OF THE FEDERAL COURT.... 85

I.

The Plaintiff Had no Cause of Action Cognizable by a Federal Court at the time it instituted this Suit either (1) to Restrain the Commission in its Contractual Capacity from Instituting Judicial Proceedings to Enforce the Contracts or (2) to Restrain the Commission in its Regulatory Capacity from Exercising its Powers under the Public Service Commission Law. That Defect could not Be Cured by Allegations, by Supplemental Bill, of Facts that Occurred Thereafter 86

(a) The Federal Court had no jurisdiction to enjoin the Commission, as a contractual party, from instituting judicial proceedings to enforce the contracts in the State Courts, even assuming the contracts to be unenforceable..... 86

(b) The Plaintiff could not at the time it instituted this suit enjoin the Commission in its regulatory capacity from taking action under the Public Service Commission Law with respect to its amendatory schedules, on the theory that the action of the Commission, if taken, would be unconstitutional..... 93

Moreover, since the Plaintiff is not entitled to any relief, except under the Public Service Commission Law, it may secure relief only as provided thereby and not by litigation in the Federal Courts..... 101

Since the Plaintiff had no Cause of Action at the Time it Filed its Original Bill that Defect cannot be Cured by Allegations, by Supplemental Bill, of Facts that Occurred Thereafter..... 104

II.

PAGE

No right Secured to the Plaintiff by the Constitution of the United States was Violated by the Refusal of the Commission to Exercise a Duty Imposed by State Statute to Relieve the Plaintiff from the Operation of its Contracts however Unprofitable they may be 109

III.

The Contracts here were Binding as Between the Parties until the Commission Exercised the Power, and Performed the Duty, Delegated to it by the Legislature, by Increasing the Contract Rate in the Manner Provided by the Public Service Commission Law 121

(a) The State did not exercise its rate-making power until the Commission exercised that power by making an Order increasing, or by approving the increase of, the contract rate. 124

(b) This principle has been sustained and applied by this Court and by the Courts of every State in which the Question has arisen. 126

This also is the Law of New York State..... 133

IV.

The District Court Failed to Distinguish between a Contract that is Void and a Contract that is Subject to Modification under the Regulatory Power of the State. Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, and San Antonio v. San Antonio Public Service Commission, 255 U. S. 547, are for that Reason Inapplicable 136

PART II.

PAGE

JURISDICTION OF THE COMMISSION 141

I.

The Principle of Strict Construction Relied on by the District Court does not Apply here. Every Presumption is Against the Jurisdiction of the Commission 142

II.

There is a Fundamental Distinction between Rate Contracts Executed without Legislative Authority and Rate Contracts which the Legislature has Expressly Authorized. The Legislature cannot be Presumed to have Excluded Contracts which it had not Authorized, or to have Included, in the Operation of a General Regulatory Law, Contracts which it had Expressly Authorized by Legislation 146

III.

By the Rapid Transit Act the State of New York Delegated to the Parties the Power to Contract Concerning the Rate of Fare both on the Subway and Elevated Lines 150

Nature of the Contracts 150

The Five-cent fare provisions in the certificate and in Contract 3 were authorized by the Rapid Transit Act 151

Concerning the Certificate 151

Concerning Contract 3 156

IV.

PAGE

The Conclusion of the District Court that Contract 3 and the Certificate are Subject to the Regulatory Powers of the Commission renders Meaningless and Self-destructive the Provisions of the Rapid Transit Act by which these Contracts were Authorized. On account of the Special Provisions of the Rapid Transit Act the Fare Stipulations in these Contracts are Withdrawn from the Rate-regulatory Powers of the Commission 157

The decision in People *ex rel.* New York, New Haven & Hartford Railroad Co. *v.* Wilcox, 200 N. Y. 423, and other decisions of the Court of Appeals have established that matters specially authorized by the Legislature are withdrawn from the operation of the Public Service Commission Law..... 162

The Rapid Transit Act, amended in 1912 to authorize the contracts here and which deals specially with the subject of Rapid Transit in Cities of over One Million Inhabitants, withdrew those contracts from the regulatory powers of the Commission with respect to fare. 165

V.

The Conditions Under which the Amendments of 1912 were Enacted, Taken in Connection with the Decision of the Court of Appeals in the Admiral Realty Company Case, prove that the Rates Stipulated in the Contracts were not Intended to be Subject to the Public Service Commission Law..... 167

In the Admiral Realty Company case the Court of Appeals directly sustained these contracts.. 168

VI.

PAGE

Other Considerations which Establish that the Legislature could not have Intended Rapid Transit Contracts to be Subject to the Jurisdiction of the Commission 172

The important Amendments of 1921, 1922 and 1923 to the Public Service Commission Law which are not even referred to by the District Court 172

The Memorial to the Legislature of 1925 173

The Approval of the Contracts by the City required by the Rapid Transit Act, together with the Amendment of 1925 to the Public Service Commission Law requiring similar approval of any modification thereof proves that it could not have been intended to permit the rate of fare to be altered against the opposition of the Commission and the City 173

The Amendment of 1909 to (former) Section 7 of the Rapid Transit Act of 1894 which remained in effect for two years after the enactment of the Public Service Commission Law in 1907 174

The consequences of holding that the Commission was under a duty to revise rates in contracts, which it was its duty to enforce, demonstrates that the Commission was not intended to exercise such regulatory authority 175

The Rapid Transit Act expressly provides for the character of public regulation that may be exercised. It may be such, and only such, as the Interborough and the Commission might agree upon with the approval of the City 175

Section 38 of the Rapid Transit Act, with respect to the modification of contracts executed under the Rapid Transit Act, further discloses the intention of the Legislature with respect to any alterations thereof 177

PAGE

The contrast between Sections 24 and 27 of the Rapid Transit Act and Section 30 of that Act is significant..... 178

VII.

People ex rel. City of New York v. Nixon, 229 N. Y. 356, is Inapplicable because the Provisions of the State Constitution under which the Franchise Contract there had been granted did not Authorize, nor had the Legislature Authorized, any Stipulation with Respect to the Rate of Fare..... 179

VIII.

By Contract 3 the Fare Provisions of Contracts 1 and 2 were Not Superseded and, Moreover, Contract 3 is "so Related" to those Contracts, both of which Antedated the Public Service Commission Law, that the Fare Provisions of Contract 3 are Excluded from the Regulatory Provisions of that Law..... 186

Even if Contract 3 had superseded Contracts 1 and 2 it is "so related to the earlier contracts" as to fall within the exception stated in the Nixon case and applied in the Garrison case.. 188

PART III.

PAGE

THE RATE OF FARE 190

I.

The Earnings of the Interborough since 1920, even as Alleged in the Complaint, have Consistently Increased, Notwithstanding the Increased Cost of Labor and Materials 190

II.

The Plaintiff is Earning More Than a Fair Return on its Property, both Subway and Elevated, Based upon its Actual Investment therein 191

III.

The Value upon which the Plaintiff is Entitled to a Fair Return is Determined by the Character of its Interest in the Property and that Value is Limited by the Provisions of Contract 3 and of the Certificate 192

The Value of the Property upon Which the Plaintiff is Entitled to a Fair Return is Exactly the Equivalent of the Value to Which it Would be Entitled if its Property were Taken by Eminent Domain 193

On account of the recapture and amortization provisions of Contract 3 and the Certificate the value of the property on which the plaintiff is entitled to earn a fair return can in no event exceed by more than fifteen per cent. its original investment cost 195

IV.

PAGE

At a Five-Cent Fare the Interborough is Earning a Reasonable Return upon the Present Fair Value of its Property Devoted to the Public Service 197

V.

On Account of the Interborough's Preferentials under Contract 3 and the Certificate it is not Entitled to a Return of 8 Per Cent 199

Conclusion 201

TABLE OF CASES.

PAGE

Admiral Realty Co. v. City of New York, 206 N. Y. 110, 138 ..... 5, 25, 34, 35, 141, 168, 170, 171
Alpers v. City and County of San Francisco, 32 Fed. 503 98
American Telephone & Tel. Co. v. Town of New Decatur, 176 Fed. 133 (N. D., Ala., 1910) 91
Arkansas Natural Gas Co. v. Railroad Commission, 261 U. S. 379 110

Beekman v. Third Ave. R. R. Co., 153 N. Y. 144 179
Bernard v. Toplitz, 160 Mass. 162 (35 N. E. 673 107
Bluefield Co. v. Public Service Commission, 262 U. S. 679 201
Boston Chamber of Commerce v. Boston, 217 U. S. 189 193
Brearly School v. Ward, 201 N. Y. 358 114
Buffalo Cemetery Association v. City of Buffalo, 118 N. Y. 61 166
Bull v. Conroe, 13 Wisc. 233 114

Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655. 199
Chicago, Burlington & Quincy R. Co. v. Winnett, 162 Fed. 242, 246-247 98
Chicago Grain Door Co. v. Chicago, G. & Q. R. Co., 137 Fed. 101 105
Christ Church v. Philadelphia, 24 How. 300 119
City of Buffalo v. Frontier Telephone Co., 203 N. Y. 589 134
City of Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446 (1918) 90
City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13 (129 N. W. 925) 128, 141
City of New York v. Brooklyn City R. R. Co., 232 N. Y. 463 ..... 162, 163
City of St. Augustine v. St. John's Electric Co., 286 Fed. 474 (C. C. A. 5th, 1923) 91
Clarkson v. Skidmore, 46 N. Y. 29 193

PAGE

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 ..... 148, 153
Cook County National Bank v. United States, 107 U. S. 445 166
Columbus Railway & Power Co. v. Columbus, 249 U. S. 399 ..... 109, 111, 153
Cooley v. Board of Wardens of Port of Philadelphia, 12 Howard 299 126
Corporation Commission v. Henderson Water Co., 190 N. C. 70 116
Corrigan v. City of Chicago, 144 Ill. 537 (33 N. W. 746) 193, 196

Dayton-Goose Creek Ry. v. United States, 263 U. S. 456 199
Des Moines v. Des Moines Ry. Co., 214 U. S. 179 ... 89, 92
Des Moines Gas Co. v. City of Des Moines, 238 U. S. 153 199
Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082 (198 N. W. 486) 196
Detroit v. Detroit Citizens Ry. Co., 184 U. S. 368 .. 148, 173
Detroit United Ry. v. Michigan, 242 U. S. 238 173

Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422 166

Farmers National Bank v. Dearing, 91 U. S. 29 102
Fitts v. McGhee, 172 U. S. 516 95

Galveston, Houston & San Antonio Ry. Co. v. Wallace, 233 U. S. 481 102
Gas & Electric Co. v. Manhattan & Queens Corp., 266 Fed. 625 99
Geneva Furniture Co. v. Karpen, 238 U. S. 253, 254 .. 101
Georgia Railway & Power Co. v. Decatur, 262 U. S. 432 ..... 109, 148
Grimmer v. Tenement House Dept., 204 N. Y. 370 166
Gubner v. McClellan, 130 App. Div. 716 150

Henrici v. South Feather Land Co., 177 Cal. 442 (170 Pac. 1135) 132

PAGE

Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 279, 282 (190 N. C. 70) 101, 114, 115, 116, 137, 140

Home Telephone & Telegraph Co. v. City of Los Angeles, 211 U. S. 265, 273 ..... 148, 149

Hudson County Water Co. v. McCarter, 209 U. S. 349 146

In re Seaholm, 136 Fed. 144 114

Laird v. Carton, 196 N. Y. 169 114

Lenawee County Gas & Electric Co. v. City of Adrian, 209 Mich 52 (176 N. W. 590) 130, 131

Litchfield Construction Co. v. City of New York, 244 N. Y. 251 150

Louisville & Nashville v. Mottley, 219 U. S. 467 146

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558 ..... 146, 148

McChord v. Louisville & Nashville R. R. Co., 183 U. S. 483 97

Matter of Evans v. Public Service Commission, 246 N. Y. 224 188

Matter of Murray Hill Bank, 153 N. Y. 199 166

Matter of Quinby v. Public Service Commission, 223 N. Y. 241, 244 (227 N. Y. 601) 100, 143, 180, 185, 186, 188, 189

Matter of Thirty-fourth Street R. R. Co., 102 N. Y. 343 179

Matter of William and Anthony Streets, 19 Wend. (N. Y.) 678 196

Mellor v. Smither, 114 Fed. 116 105

Michigan Central R. R. v. Powers, 201 U. S. 245 171

Milwaukee Electric Railway & Light Co. v. Railroad Commission, 238 U. S. 174 128

Minneapolis v. Street Ry. Co., 215 U. S. 417 173

Missouri Pacific Ry. Co. v. Larrabee Mills, 211 U. S. 612 126

PAGE

Missouri Ry. Co. v. Oalathe, 156 Fed. 624..... 99
Monroe (City of) v. Detroit M. & T. Short Line R. Co., 187 Mich. 364 (153 N. W. 669).....130, 132
Municipal Gas Co. v. Public Service Commission, 224 N. Y. 156, 165-166..... 100

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650..... 148
New Orleans Water Works Co. v. New Orleans, 164 U. S. 41, 481..... 96
New York Security & Trust Co. v. Lincoln St. Ry. Co., 74 Fed. 67..... 106

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290.. 114
Omaha Water Co. v. City of Omaha, 147 Fed. 1..... 153
Opelika v. Opelika Sewer Co., 265 U. S. 215
121, 123, 137, 139, 140
Ottinger v. Consolidated Gas Co., 272 U. S. 576..... 100

Paducah v. Paducah Railway, 261 U. S. 267..... 109
Parker v. Elmira C. & N. R. R. Co., 165 N. Y. 274.... 165
People ex rel. City of New York v. Nixon, 229 N. Y. 356, 645.....140, 147, 179, 181, 182, 183, 184, 185, 186, 187, 189
People ex rel. Garrison v. Nixon, 229 N. Y. 645...188, 189
People ex rel. Leary v. Knox, 166 N. Y. 444..... 166
People ex rel. Municipal Gas Co. v. Public Service Commission, 224 N. Y. 156..... 100
People ex rel. New York, Westchester & Boston Railway Co. v. Public Service Commission, 193 App. Div. 445 (aff'd 230 N. Y. 604).....134, 135
People ex rel. N. Y. etc. R. R. Co. v. Wilcox, 200 N. Y. 423.....144, 162
People v. Crane, 214 N. Y. 154, 239 U. S. 195..... 118
People v. Rosenheimer, 209 N. Y. 115.....117, 118
Petri v. Creelman Lumber Co., 199 U. S. 487..... 166
Pollard v. Bailey, 20 Wall. 520..... 102
Prentis v. Atlantic Coast Line Co., 211 U. S. 210....93, 95
Producers Transportation Co. v. Railroad Commission of California, 251 U. S. 228..... 146
Public Service Commission v. St. Cloud, 265 U. S. 352.....109, 160, 170

PAGE

Public Service Commission v. Westchester Street R. Co., 206 N. Y. 209 71
Putney v. Whitmire, 66 Fed. 385 106

Rico v. Snyder, 134 Fed. 953 99
Rodgers v. United States, 185 U. S. 83 166
Ross v. Oregon, 227 U. S. 150 92

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 149. 88
Salt Lake City et al. v. Utah Light & Traction Co., 52 Utah 476 (173 Pac. 556) 133, 141

San Antonio v. San Antonio Public Service Commission, 255 U. S. 547 ..... 137, 140
San Antonio Traction Co. v. Altgelt, 200 U. S. 304 ... 139
San Diego Water Co. v. City of San Diego, 118 Calif. 556 (50 Pac. 633) 194
Silver v. Louisville & Nashville R. R. Co., 213 U. S. 175, 194 144
South Covington Ry. Co. v. Newport, 259 U. S. 97, 100 89
Southern Iowa Electric Co. v. Chariton, 255 U. S. 539 ..... 137, 138, 140
Southern Pacific Co. v. Bartine, 170 Fed. 725, 775 ... 97
Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291 (159 Pac. 865) 132
Southern Utilities Co. v. Palatka 268 U. S. 232 .....
109, 121, 123, 137, 140
Southern Utilities Co. v. Palatka, 86 Fla. 583 141
St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352 ..... 109, 148, 160, 170
Stevens v. St. Mary's Training School, 144 Ill. 332 ... 99
Superior Water, Light & Power Co. v. City of Superior, 263 U. S. 125 148

Townsend v. Little, 109 U. S. 504 166
Traverse City v. Michigan Railroad Commission, 202 Mich. 575 (168 N. W. 481) 133

Union Dry Goods Co. v. Georgia Public Service Commission, 248 U. S. 372 146
United States v. Babcock, 250 U. S. 328 102

PAGE

Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496 148

Village of Fort Edward v. Hudson Valley Ry. Co., 192 N. Y. 139 ..... 162, 163, 174

Western Union Telegraph Co. v. Georgia, 269 U. S. 67 90

Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas, 260 U. S. 48 120

Willcox v. Richmond Light & R. Co., 142 App. Div. 44, 142 N. Y. 515 71

Willcox v. Consolidated Gas Co., 212 U. S. 19 .....
100, 194, 199

STATUTES.

PAGE

Rapid Transit Act—

Laws of 1891:
- Chapter 4 . . . . . 4, 5
- Section 7 5
- Section 32 6

Laws of 1892, Chapters 102, 556 5

Laws of 1894:
- Chapter 752 . . . . . 5, 6, 8
- Section 7 . . . . . 8, 20, 174
- Section 12 6
- Section 13 6
- Section 34 (now 27) 7, 8, 9
- Section 63 176

Laws of 1895, Chapter 519 5

Laws of 1896, Chapter 729 5

Laws of 1900, Chapter 616 5

Laws of 1901, Chapter 587 5

Laws of 1902, Chapters 533, 544, 584 5

Laws of 1904, Chapters 562, 564 5

Laws of 1905, Chapters 599, 631 5

Laws of 1906:
- Chapter 472 . . . . . 5, 10, 173
- Section 34 11
- Chapters 606, 607 5

Laws of 1907, Chapter 534 . . . . . 5, 21

Laws of 1908, Chapter 472 . . . . . 5, 21

Laws of 1909:
- Chapter 498 . . . . . 5, 8, 20, 22, 167, 174
- Section 63 7
- Section 65 22
- Section 22 20

Laws of 1910, Chapters 205, 504, 505, 506 . . . . . 5, 145

Laws of 1911, Chapter 888 5

Laws of 1912:
- Chapter 226 . . . . . 5, 26 27, 34, 148, 167, 168, 173
- Section 9 . . . . . 70, 175

PAGE

Section 24 . . . . . 1, 27, 28, 31, 32, 41, 42, 45, 151, 155, 168, 175, 178
Section 27 . . . . . 1, 29, 30, 32, 40, 45, 71, 151, 156, 168, 175, 178, 189
Section 29 . . . . . 32, 33, 71, 175
Section 30 178
Section 38 33
Section 58 176
Section 181 145
Section 229 145
Laws of 1913, Chapters 100, 510, 524, 540 5
Laws of 1914, Chapter 118 5
Laws of 1915, Chapters 534, 543, 544, 545, 590, 604 5
Laws of 1917, Chapters 612, 625 5
Laws of 1921, Chapter 608 5

Public Service Commission Law—

Laws of 1907:
Chapter 429 . . . . . 12, 148, 168, 174, 179, 181
Section 5 . . . . . 18, 19, 161
Section 26 . . . . . 12, 13, 103, 125
Section 28 . . . . . 13, 59
Section 29 . . . . . 14, 18, 62, 63, 67, 68, 125
Section 33 . . . . . 16, 125
Section 45 162
Section 49 . . . . . 16, 17, 18, 46, 48, 50, 52, 54, 100, 125, 143, 163, 172, 186
Section 53 162
Section 57 . . . . . 71, 72
Section 83 . . . . . 18, 19, 161
Section 87 (now Section 127) 18

Laws of 1909, Chapter 498:
Section 2 20
Section 22 20
Section 38 177
Section 49 186

PAGE

Section 63 . . . . . 7, 8, 177
Section 65 22
Laws of 1910, Chapter 480 12

Laws of 1921:
Chapter 134 47
Sections 4-a, 5-a 47
Section 24 178
Section 27 178
Section 30 178
Section 38 . . . . . 177, 178
Section 49 . . . . . 50, 51, 52, 54, 172
Section 105 48
Section 106 49
Section 107 . . . . . 49, 50
Section 108 49
Laws of 1922, Chapter 153, Section 49 . . . . . 52, 53
Laws of 1923, Chapter 891, Section 49 54
Laws of 1925, Chapter 641, Section 112 . . . . . 59, 174

Special and General Laws—
Laws of 1850, Chapter 140 3
Laws of 1875, Chapter 606 (Rapid Transit Act of 1875) 3, 4
Laws of 1884, Chapter 252 3
Laws of 1890 (Railroad Law) 4, 134
Laws of 1894, Chapter 743 . . . . . 6, 8, 45, 81, 92, 93, 100
Laws of 1909, Chapter 498, Section 63 . . . . . 7, 8
Laws of 1910:
Chapter 49 145
Chapter 504 145

Constitution of the State of New York—
Article III, Section 18 . . . . . 179, 182
Article VIII, Section 10 169

Constitution of the United States—
Article I, Section 10 148

PAGE

United States Judicial Code—

Section 380 2

Federal Statutes—

Interstate Commerce Act as amended 1906, Chapter 3591, Laws of 1906 127

Supreme Court of the United States

JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, et al.,

Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY.

BRIEF ON BEHALF OF APPELLANT, TRANSIT COMMISSION.

Opinion of the District Court.

The opinion of the Statutory Court is reported in 26 Federal Reporter, 2nd Series, page 912.

Jurisdiction of This Court.

This is an appeal taken on May 12, 1928 (Record, pages 2007-2008), by the defendants, constituting the Transit Commission* and the City of New York, from an order

* NOTE—By the terms of Sections 24 and 27 of the Rapid Transit Act, under which the Contracts herein were made, the Transit Commission was authorized to execute, with the "approval" of the City, Contract 3 and the Elevated Extension Certificate.

These Contracts were, accordingly, so executed and are signed—

"PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT.
(Seal of Commission)

By EDWARD E. MCCALL,
Chairman.

Attest:
TRAVIS H. WHITNEY,
Secretary."

of the United States District Court for the Southern District of New York, constituted of three judges, in accordance with Section 380 of the United States Code, entered in the office of the Clerk of the District Court on May 10, 1928, granting the plaintiff's motion for an interlocutory injunction restraining the defendants from preventing the plaintiff-appellee, Interborough Rapid Transit Company, by judicial proceedings or otherwise, from charging a fare of seven cents upon its system of rapid transit railways and from in any way enforcing or attempting to enforce against the plaintiff a rate of fare of five cents per passenger on the rapid transit lines operated by it (Record, page 1998).

Section 380 of the United States Code provides for an appeal direct to this Court.

Method of Presentation.

The legislative background of the Contracts at issue in this case, the circumstances surrounding the making of the Contracts themselves, the past and present attempts of the Interborough Company to increase the fare, and the immediate facts of this litigation are so inextricably interwoven that the simplest method of presentation seems to be to state all the relevant occurrences in chronological order.

(*Continued from page 1*)

The Rapid Transit Act, Section 9, likewise places on the Commission the duty of instituting all suits for violations of their provisions, and it is probably for these reasons that the Complaint (page 5) alleges:

> "The plaintiff *does not allege* that the defendant, The City of New York, is a necessary *or proper* party to the determination of the issues in this action, but names The City of New York as a defendant in view of the facts and circumstances hereinafter set out."

Statement and Discussion of Facts and Pertinent Legislation in Chronological Order.

The facts upon which the decision of this appeal depends are not disputed or disputable except so far as they relate to the alleged confiscatory character of the five cent fare, which, however, is fixed by contract. Accordingly the question of whether that contractual rate is reasonable, confiscatory or exorbitant, does not, as we insist, arise. We will, therefore, reserve for discussion under the division of this brief relating to that subject our statement of the facts and figures bearing upon the alleged confiscatory character of the contractual rate of fare, inasmuch as the Court may not be called upon to concern itself therewith.

Legislation preceding the Enactment of The Rapid Transit Act of 1891.

The first statute concerning the construction and operation of railroads in New York State is Chapter 140 of the Laws of 1850 entitled

> "An act to authorize the formation of railroad corporations and to regulate the same."

In 1875 there was enacted Chapter 606 of the Laws of that year entitled

> "An Act further to provide for the construction of a steam railway or railways in the counties of the state."

This statute which is "The Rapid Transit Act *of 1875*," is still in effect, and should not be confused with the Rapid Transit Act *of 1891*, out of which this litigation arises.

In 1884 (Chap. 252 of the Laws of 1884) there was enacted

> "An act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages"

—known as the General Surface Railroad Act. It expressly (Sec. 16) withdrew Street *Surface* Railroads from the operation of the Rapid Transit Act of 1875 and provided that thereafter no street surface railroads should be constructed under the provisions of that Law.

In 1890 the Railroad Law was comprehensively revised by the inclusion of provisions relating to

(1) *Railroads*, which theretofore had been covered by the provisions of the Railroad Law of 1850;

(2) Street *Surface* Railroads which theretofore had been covered by the provisions of the General Surface Railroad Act of 1884;

(3) *Other* railroads in cities and counties (Rapid Transit Railroads), which theretofore had been covered by the Rapid Transit Act of 1875.

The Rapid Transit Act of 1875, as incorporated in the Railroad Law of 1890, related, it should be observed, to the construction and operation of Rapid Transit Railroads in *any* city of the State.

The Rapid Transit Act of 1891.

In 1891 there was enacted the Rapid Transit Act of that year (Chap. 4 of the Laws of 1891), which is the Rapid Transit Act out of which this litigation arises. It was entitled

"An act to provide for Rapid Transit Railways in cities *of over one million inhabitants*."

This statute withdrew from the operation of the Rapid Transit Act of 1875, as incorporated in the Railroad Law of 1890, all Rapid Transit Railroads in the City of New York and was intended to contain provisions applicable to such Rapid Transit lines and to them alone.

The Rapid Transit Act received the Governor's approval on January 31, 1891. From then until the present day,

the provisions of that Act, amended and supplemented through the years,* have stood as the authoritative legislative structure erected specially to provide for the rapid transit situation in New York City. Although the Act has always applied *in terms* to "rapid transit railways in cities of over one million inhabitants," it has, as this Court judicially knows, always applied *in fact* only to New York City, no other city in the State ever having attained the required population. The Act was made general *in terms* in order to avoid a limitation in the state constitution with respect to the enactment of special city legislation (*Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110, 138).

The provisions of the Rapid Transit Act and of the various amendments thereto must themselves be read in order fully to realize how comprehensive an effort was made to deal specially with the rapid transit situation in New York City. Here we can do no more than refer to some of their more important features.

The Rapid Transit Act of 1891 (which will be referred to as the Rapid Transit Act) contained no provision for rapid transit lines to be constructed at *municipal* expense. It contemplated (Sec. 7) *private* construction and operation of rapid transit lines under franchises to be granted by the "Board of Rapid Transit Railroad Commissioners" therein appointed, which franchises, it was provided, should be sold at public sale upon terms and conditions to be specified by the Commissioners. Section 7 provided

---

* Note—The Rapid Transit Act has been amended over forty times as follows: Laws 1892, chapters 102 and 556; Laws 1894, chapters 528 and 752; Laws 1895, chapter 519; Laws 1896, chapter 729; Laws 1900, chapter 616; Laws 1901, chapter 587; Laws 1902, chapters 533, 544 and 584; Laws 1904, chapters 562 and 564; Laws 1905, chapters 599 and 631; Laws 1906, chapters 472, 606 and 607; Laws 1907, chapters 429 and 534; Laws 1908, chapter 472; Laws 1909, chapter 498; Laws 1910, chapters 205, 504, 505 and 506; Laws 1911, chapter 888; Laws 1912, chapter 226; Laws 1913, chapters 100, 510, 524 and 540; Laws 1914, chapter 118; Laws 1915, chapters 534, 543, 544, 545, 590 and 604; Laws 1917, chapters 612 and 625, and Laws 1921, chapter 608.

that these terms of sale "must," among other matters, specify

> "the maximum rates of fare and freight which such corporation may charge and collect for the carriage of persons and property."

The Rapid Transit Act also contained authority to the Board of Rapid Transit Railway Commissioners (Sec. 32) to permit the *extension* of then existing or thereafter conshtructed rapid transit facilities and the issuing of an "Extension Certificate" therefor. It was provided that such a Certificate might be granted upon specified conditions and upon

> "such other terms, conditions and requirements as to the said board may appear just and proper."

Enactment of Chapter 743 of the Laws of 1894 Limiting the Rate of Fare on Certain Elevated Railroads.

By Chapter 743 of the Laws of 1894 the rate of fare upon *a part* of the Elevated Lines then operated by the Manhattan Company was limited to five cents. This limitation was applicable *only* to lines east of Broadway between the Battery (the south end of Manhattan Island) and 129th Street (Complaint, Par. XI, Record, page 13).

This statute was *not*, it should be understood, a part of or an amendment to the Rapid Transit Act.

Amendment of 1894 to the Rapid Transit Act.

The City of New York and the Board of Rapid Transit Railroad Commissioners were unable to interest private capital in the construction of rapid transit lines and in 1894 the Rapid Transit Act was accordingly amended to include provisions requiring the submission to the electorate at the next general election of the question whether rapid transit facilities in New York City should be constructed *by the City at its own expense* (Sections 12 and 13 of Chap. 752, Laws of 1894).

The same statute further provided (Sec. 63):

> "In case it shall be determined by vote of the people, as provided by Sections 12 and 13 of this Act, to construct by and at the city's expense, then, and in that event, *the road or roads so constructed shall be and remain the absolute property of the city* so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, *to be used and enjoyed by the public upon the payment of such fares and tolls and subject to such reasonable regulations as may be imposed and provided for by the Board of Rapid Transit Railway Commissioners in said city.*"*

The vote of the people at the next election overwhelmingly approved the proposal.

Under the sanction of this Act the City constructed and accordingly now owns the subway lines involved in this suit.

The statute further provided that should the people approve the proposal, the Board of Rapid Transit Railroad Commissioners might make a contract for the construction of the rapid transit lines. This section (Sec. 34) read as follows:

> "The said board for and on behalf of said city shall enter into a contract with any person, firm or corporation which in the opinion of said board shall be best qualified to fulfill and carry out said contract for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted for such sum or sums of money to be raised and paid out of the treasury of said city as hereinafter provided and on such terms and conditions not inconsistent with the aforesaid plans and specifications as said board shall determine to be best suited for the public interest."

---

* Note—Subsequently, and after the Public Service Commission in 1907 had been substituted for the Board of Rapid Transit Railway Commissioners as the *contracting* body to execute the contracts and agree upon the rate of fare this section was amended (Section 63 of Chapter 498 of the Laws of 1909) by adding at the conclusion thereof "or by the Public Service Commission."

Then follow the important provisions with respect to a contract for the equipment, maintenance and operation of the rapid transit lines so to be constructed, including the following:

> "Such contract *shall also provide* that the person, firm or corporation so contracting to construct said road or roads shall at his or its own cost and expense equip, maintain and operate said road or roads for a term of years to be specified in said contract not less than thirty-five nor more than fifty years *and upon such terms and conditions as to the rates of fare to be charged* and the character of service to be furnished and otherwise *as said board* shall deem to be best suited to the public interests* and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board."

By the amendments of 1894, Section 7 of the Rapid Transit Act, which provided for the granting of a franchise for the *private* construction and operation of rapid transit lines, was amended by eliminating the provision that the terms of sale must specify "the maximum rates of fare" and so as to provide instead:

> "The said terms of sale *must also specify* the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount of the bonded indebtedness which such corporation shall be authorized to incur, and which may be secured by mortgages upon its property and franchises, and the rates of fares and freights which such corporation may charge and collect for the carriage of persons and property. *But the rate of fare for any passenger on said railway from any point on the same northward or southward within the City of New York shall not exceed five cents under any provision of this Act.*"

---

* Note—Subsequently, and after the Public Service Commission in 1907 had been substituted for the Board of Rapid Transit Railway Commissioners as the *contracting* body, the word "Commission" was substituted for the word "Board" (Chapter 499 of the Laws of 1909).

This, however, had no relation to rapid transit lines to be constructed at *municipal* expense (such as the lines involved in this litigation) which were covered by Section 34 (now Section 27) and which contained the *unlimited* grant of power to contract concerning the rate of fare. But the provision limiting the fare to five cents on *privately* constructed Rapid Transit lines is nevertheless important as will hereafter be seen (*Post*, pages 174-175).

Therefore, although with respect to *municipally* constructed rapid transit lines, leased for private operation, the grant of power to contract with respect to rates of fare was *unlimited*, with respect to rapid transit lines that might be *privately* constructed and operated *it was required by the express terms of the Act that the franchise contract should provide that the rate of fare "shall not exceed five cents."*

Execution of Contracts 1 and 2.

The Rapid Transit Act remained unchanged, except for amendments of subordinate importance, until after the execution of Contracts 1 and 2, both of which were executed by the Board of Rapid Transit Railway Commissioners.

Contract 1 was made on February 21, 1900, between the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, and John B. McDonald. It provided for the construction, *at the expense of the City of New York*, of a Subway line running approximately from South Ferry to 42nd Street and Madison Avenue, thence to Times Square and thence to Van Courtland Park together with a branch from 96th Street to West Farms, and its operation by John B. McDonald during a term of 50 years (with the privilege of a renewal for twenty-five years) for a specified annual rental to be paid to the City equal to 4% and an annual sinking fund of 1% upon the City's investment of $54,478,049.05 (Record, pages 45-46, 1172).

Contract 2 was made on July 21, 1902, between the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, and the Rapid Transit Subway Construction Company. This contract provided for the construction, *also at the expense of the City of New York*, of a Subway line running approximately from South Ferry to Atlantic Avenue, Brooklyn, and the operation of that line by the Rapid Transit Subway Construction Company for a term of 35 years (without renewal) at a specified annual rental to be paid to the City calculated in the same way upon the City's investment of $6,667,517.14 (Record, pages 45-46, 1172).

Both these contracts were, in so far as they related to the leasing and operation of the Subways, thereafter assigned to the plaintiff with the approval of the Board of Rapid Transit Railway Commissioners (Record, page 45).

Both Contract 1 and Contract 2 contain the following provision (Chap. III—The Lease):

> "The contractor shall *during the term of the lease* be entitled to charge *for a single fare upon the railroad the sum of five cents but not more.*"

Lease in 1903 by the Interborough Company of All the Elevated Lines Owned by the Manhattan Company.

In 1903 the Interborough Company leased all the Elevated Lines of the Manhattan Railway Company for a term of 999 years. The rental to be paid for these lines was the guarantee by the Interborough Company of seven per cent. on the stock of the Manhattan Company (Record, pages 7, 8, 9).

Amendments of 1906 to the Rapid Transit Act.

In 1906 (Chapter 472 of the Laws of 1906) the Rapid Transit Act was again amended in very important respects. There were inserted provisions, which permeate the Act

at almost every point, requiring *"the approval"* of the City of New York, to be expressed by its Board of Estimate and Apportionment, to every step in the creation of rapid transit facilities and particularly in connection with the execution of any Contract or Extension Certificate with respect thereto. Thereafter no rapid transit railway could be constructed, no Contract with respect to the equipment, maintenance or operation of a rapid transit railroad could be made, and no Extension Certificate could be granted *without "the approval" of the Board of Estimate and Apportionment*. These provisions appear sixteen times throughout the Rapid Transit Act as amended in 1906.

These provisions were obviously enacted in deference to the sentiment that neither the "route" of new Rapid Transit lines nor the "extension" of earlier ones nor the terms upon which Contracts or Certificates might be made should be forced upon the local authorities *by a State body*. The subject, it is true, appears not to have been regarded as one of *exclusively* local concern, for the City was not authorized to make Rapid Transit Contracts *directly* with the transit companies. It was not, however, regarded as a matter *exclusively* of State concern, for the Commission was *prohibited* from making any rapid transit Contracts without the "approval" of the City. After 1906, therefore, it required the *concurrence* of the State and Local authorities before any such contracts could be made.

By the amendments of 1906 Section 34 was also amended to provide that rapid transit lines constructed at public expense might *either* be municipally operated (Section 34-d) *or* leased for equipment or operation to a private corporation which might be, but was *not* required to be, the corporation constructing the lines under contract with the City.

The Public Service Commission Law.

In 1907 (seven years and five years, respectively, after the execution of Contracts 1 and 2) the Public Service Commissions Law was enacted under the terms of which it took effect July 1, 1907. It was originally enacted as Chap. 429 of the Laws of 1907 and subsequently as revised became Chap. 48 of the Consolidated Laws by Chap. 480 of the Laws of 1910 in effect July 14, 1910.

This statute is very important here for the reason that its terms provide the basis of the claim of the Interborough that the fare provisions of the Contracts are subject to modification thereby.

The Public Service Commissions Law was of general application. It provided a comprehensive scheme for the regulation of public utilities throughout the State.

Regulatory or Legislative Powers Vested in the Commission by the Public Service Commission Law.

Section 26 of the The Public Service Commissions Law provides:

> "Sec. 26. *Safe and adequate service; just and reasonable charges.* Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable *and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter.* Every unjust or unreasonably charge made or demanded for any such service or transportation of passengers or property or in connection therewith *or in excess of that allowed by law or by order of the commission is prohibited.*"

The provisions of Section 26 evidence a clear intent that the *"order of the Commission"* fixing the rate should be binding upon the carrier and the public alike and that the rate so fixed might not be exceeded by the carrier. In *determining* the rate to be fixed *by its order* the Commission was directed to apply the standard of reasonableness expressed by the Statute.

Section 28 is the section under which a public utility must file its schedule of rates when it *commences* operation. It provides:

> "Sec. 28. *Tariff schedules; publication.* Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. * * *"

> The *form* of every such schedule shall be prescribed by the Commission and shall conform in the case of railroad corporations as nearly as may be to the *form of schedule* required by the interstate commerce commission under the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes *in the form of such schedules* as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions."

Section 29 relates to *proposed changes* in schedules theretofore filed, which proposed changes *cannot, without special order of the Commissioner take effect until the expiration of 30 days*, during which the Commission may take action with respect thereto. It provides:

> "Sec. 29. *Changes in schedule; notice required; power of suspension by the commission.* Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, *which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rate, fare or charge will go into effect;* and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so

made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, *the commission shall have and is hereby given authority*, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension *may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice*, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing *whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective.*"

It will thus be seen that the Commission has no power to prescribe *in advance* the rates to be specified in schedules thus filed by the carrier but may proceed with respect to a proposed change in rate, after filing, in the manner provided by *Section* 29 *or by Section* 49, *soon to be considered.*

Section 33 provides that the rate to be charged *shall be the rate specified in the schedules in effect at the time.* It provides:

> "Sec. 33. *Transportation prohibited until publication of schedules: rates as fixed to be charged; passes prohibited.* 1. No common carrier subject to the provisions of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. *No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time.*"

Section 49 is the general section which gives the Commission power to "determine" the rate whenever "*in its opinion*" the rate is unreasonable and "*to fix*" the rate *by order* to be served upon" the carrier. So far as material to the present litigation it provides:

> "Sec. 49. *Rates and service to be fixed by the commission.* 1. Whenever either commission *shall be of opinion*, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for

> the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to the estimated prospective earning capacity of such property *at the rate of fare at the time fixed and existent* and to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, *determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed*, notwithstanding that a higher rate, fare or charge has been heretofore authorized *by general or special statute*, and shall *fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.*"

It will thus be observed that *in cases properly within its jurisdiction* and in the absence of contract, two methods are provided by which a carrier may *initiate* proceedings for an increased rate, but that *in both cases* the Commission remains in full control of the rate to be charged:

First, under Section 49, in which event the carrier does not file amendatory schedules, but makes application for a "determination" of its rate and thereupon the Commission

> "shall fix the same by order to be served upon all common carriers * * * by whom such rates, fares and charges are thereafter to be observed."

Second, under Section 29, in which event the carrier files amendatory schedules of its rates to become effective at the expiration of thirty days. After such amendatory schedules are filed the Commission remains none the less in complete control of the rate to be charged by reason of its powers under Section 29. Since the proceedings to determine the rate may not be concluded within the period of thirty days, the Commission is "given authority"

to "suspend the operation of such schedules and defer the use of such rate" for certain specified periods of time during which the question of "the propriety of such rate" is under consideration. Obviously, however, the determination of "the propriety of such rate" may involve a mere question of law or a simple question of fact and may therefore be capable of determination *within the period of thirty days* in which event no order "suspending the operation of such schedules" may be necessary. Accordingly, the Commission is given authority, without suspending the rate, *to take the same action* that it might take under Section 49 after the rate had become effective. This is contained in those provisions of Section 29 which provide that either

> "*before or after the rate, fare, charge, classification, regulation or practice goes into effect*, the Commission may make such order in reference to such rate, fare, charge, classification, regulation or practice *as would be proper in a proceeding initiated after the rate*, fare, charge, classification, regulation or practice *had become effective*."

The effect, therefore, of Sections 29 and 49 is to vest the Commission *in either case* with complete control over the rate to be charged, the difference consisting merely in *the method* by which the proceedings are initiated.

Abolition, by the Public Service Commission Law, of the Board of Rapid Transit Railroad Commissioners, and Substitution for that Board of the Public Service Commission of the First District as the Contract Making Body under the Rapid Transit Act with All the Contractual Powers of that Board.

By the Public Service Commission Law also (Section 87, now Section 127), Sections 1 to 3 of the Rapid Transit Act were repealed, thereby abolishing the Board of Rapid Transit Railroad Commissioners in which had been *vested all the contractual authority* under the Rapid Transit Act. *All* that contractual authority was, by Sections 5 and 83

of the Public Service Commission Law, transferred to the newly created Public Service Commission for the First District, and it was provided that, *in addition to its regulatory powers*, it should exercise authority as follows:

> "And *in addition thereto* the Commission in the First District shall have and exercise *all the powers* heretofore conferred upon the Board of Rapid Transit Railroad Commissioners under Chapter 4 of the Laws of 1891 entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants' and the Acts amendatory thereto" (Subdivision 6 of Section 5 of the Public Service Commission Law of 1907).

It was again provided by Section 83 that

> "*All the powers* and duties of such Board (the Board of Rapid Transit Railroad Commissioners) shall thereupon be exercised and performed by the Public Service Commission of the First District."

These provisions of *the Public Service Commission Law* leave no possible justification even for the inference that by setting up a State agency having jurisdiction to fix reasonable rates, the legislature intended to abrogate *the specific authority to contract for a fixed rate* theretofore exercised under the Rapid Transit Act by the Board of Rapid Transit Railway Commissioners. The legislature did not leave its intention in this respect to inference. *At the very instant* that it enacted the Public Service Commission Law it had this subject in mind. It dealt with the matter then specifically and changed the former situation only by abolishing the Board which it had constituted as the contracting body, and by *substituting* for that body the newly created Commission for the First District. Beyond the substitution of one agent for another, the legislature did not go. On the contrary, *it expressly vested the new contractual body with all the powers of the old and repealed only so much of the Rapid Transit Act as had to do with the mere existence of the earlier Board.*

It will thus be observed that the Public Service Commission was vested with *twofold power*. It was vested with *regulatory* authority under the general provisions of the Public Service Commission Law and *"in addition thereto"* it was vested with "all" the *contractual* authority previously delegated to the Board of Rapid Transit Railroad Commissioners by the Rapid Transit Act which descended to the Public Service Commission under Sections 5 and 83 of the Public Service Commission Law.

Amendments of 1909 to the Rapid Transit Act.

In 1909 (Chapter 498 of the Laws of 1909) the Rapid Transit Act was again revised by further extending the powers of the Commission and the City. By these amendments the Commission was authorized, instead of *selling at public sale* the franchise privately to construct and operate rapid transit lines as had previously been provided by Section 7,

> "*to grant a franchise* to construct, maintain and operate such railroad for the transportation of passengers and property."

By the amendments of 1909 the specific limitations of Section 7 of the Rapid Transit Act of 1894 requiring that a franchise for *private* construction and operation be conditioned on a 5-cent fare were repealed (Section 2 of Chapter 498 of the Laws of 1909) and there was enacted instead Section 22 of Chapter 498 of the Laws of 1909 relating to the private construction of rapid transit lines, providing that:

> "The Commission shall have power to prescribe *all* such terms and conditions of such grant and to require such security to be given and filed, for the keeping and performance of such terms and conditions *as it may deem to be for the best interest of the public and of the City.*"

It will thus be observed that at the time of the enactment of the Public Service Commission Law *and for two years thereafter*—1907 to 1909—and notwithstanding that the Legislature during this intervening period *twice amended* the Rapid Transit Act (Chapter 534, Laws of 1907; Chapter 472, Laws of 1908) it did not undertake in any particular to alter the provisions of Section 7 until, by the enactment of Section 22 in 1909, *it extended the powers of the Commission by removing this, the only limitation* even with respect to *privately* constructed rapid transit lines.

It is impossible that the Legislature, when it enacted the Public Service Commission Law, intended that the very provision which, by the Rapid Transit Act, *was required to be inserted in contracts* in order that rates of fare on *privately* constructed rapid transit lines should never, during the period of the grant, exceed five cents, should, *at the same time,* have intended by the general regulatory provisions of the Public Service Commission Law to frustrate that term of the grant thus *required* to be imposed.

The amendments of 1909 left undisturbed the power of the Commission to enter into contracts for equipment, maintenance and operation of the *municipally* owned lines which were *required* to contain

> "such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said commission shall deem to be best suited to the public interests."

It also left undisturbed the power of the Commission to condition an Extension Certificate upon

> "such other terms, conditions and requirements as to the commission may appear just and proper."

Notwithstanding the enactment two years earlier of the Public Service Commissions Law, the amendments of

1909 to the Rapid Transit Act *expressly repealed all acts or parts of acts, general or local, in conflict with its provisions.* Sec. 65, the "Repealing clause," provides:

> "*Repealing clause.*—All acts and parts of acts, local or general, inconsistent with this act, *are hereby repealed.*"

Negotiations Preceding the Execution of Contract 3 and the Elevated Extension Certificate.

The subways constructed under Contracts 1 and 2 failed to provide a solution for the City's transportation problems. The lines were hardly completed when the need for additional lines asserted itself. Extensive effort on the part of the Public Service Commission finally resulted in two plans for construction and operation of new rapid transit lines, one under agreement with the Interborough, the other under agreement with the Brooklyn Rapid Transit Co. The proposed agreement with the Interborough later ripened into Contract 3 and the Elevated Extension Certificate of 1913. The record of the negotiations between the Commission, on behalf of the City, and the Interborough make perfectly clear the conviction by all concerned that the five cent fare proposed to be agreed upon was to endure throughout the term of the agreement. Otherwise there would have been no point to the initial differences between the Commission and the Interborough which it required protracted negotiations to adjust; and, as we shall show in its proper place, there would also have been no point to the litigation and legislation subsequently enacted, which was designed to and which did enable the accomplishment of the plans as finally agreed upon.

The City, on the one hand, desired the Interborough to undertake the construction, principally at the City's expense, of a new subway line from an *undeveloped* section in Brooklyn to and along the west side of lower Manhattan connecting with the upper west side subway already

in operation by the Interborough. It also desired another line from *undeveloped* sections in the Bronx to and along the east side of upper Manhattan connecting with the lower east side subway already in operation. It wanted the Interborough to equip the new lines, and to operate all the lines including those constructed under Contracts 1 and 2, as a single system for a single five cent fare. The City wanted to "synchronize" the term of the leases under Contracts 1, 2 and 3 so that they would all expire simultaneously at the end of forty-nine years. Finally the City desired the privilege of requiring the Interborough to operate additional new lines as part of the system and the right to "recapture," after ten years and on specified conditions, all or part of the new line, or part of the new and part of the old, so that the City might acquire a continuous line for operation in competition with the line which the Interborough would retain. (Record, pages 280, 281, 456-465, 554 *et seq.*)

The Interborough was concerned chiefly with the diminution in its profits, which it anticipated would result *from the operation of a much longer system at the same rate of fare*. Operations under Contracts 1 and 2 were unusually profitable because of the heavy short distance traffic which the lines chiefly carried. The new lines would extend into undeveloped outlying districts, and the Interborough anticipated that the new long distance traffic might be carried at a loss. Under the two old leases, the City had not the privilege of compelling the Interborough to operate new lines, and that Company was unwilling to do so without the inducement of a substantial *quid pro quo*. This *quid pro quo* finally took the form of the preferential payment provisions ultimately incorporated in Contract 3. Under these provisions, the annual income of the whole system was to be pooled and before the City was entitled to be paid any rental for the use of the new lines, the Interborough was to retain amounts necessary to pay, roughly (1) its operating expenses, (2) interest and sinking fund installments on

money expended by the Company for construction and equipment; and (3) an amount estimated to be equal to the annual earnings of the Interborough under Contracts 1 and 2. The right to retain these sums was to be cumulative, and not until all amounts so provided for were fully paid, could the City receive any rental for the lease of the new lines. These facts are fully stated in the Report of the Conference Committee of the Board of Estimate to the Board on June 13, 1911 (Record, pages 260-399).

The record of the negotiations between the Commission, the City and the Interborough is replete with convincing proof that *all* the parties assumed and recognized that the single unchangeable five cent rate of fare on the entire system throughout the forty-nine year term was to be the very cornerstone of the agreement. It furnished the basis for the Interborough's insistence upon the preferential payment provisions and one of the most important inducements to the Commission and the City to consent to those provisions. The parties did more than tacitly assume that the five cent fare provision would have to obtain throughout the term. The Interborough urged it on the Commission in justification of its demands[1]; the Commission urged it on the Board of Estimate and Apportionment in justification of its acceptance of those demands[2] and a special Committee of the Board did likewise.[3] When the contract was informally agreed upon, there was clear unanimity that the five cent fare provision would constitute a contract, binding on all the parties irrespective of the profits it might yield or the losses it might cause the Interborough. The City had purchased that provision by submitting, at vast sacrifice to the Interborough's demand for preferential treatment. The Interborough had submitted to the provision because of the tremendous advantage thus received.

---

[1] R. 190, 191, 194, 195, 196, 199, 201, 349, 554.
[2] R. 188.
[3] R. 345, 396, 403, 406, 372, 373, 408, 442, 509.

Institution on February 24, 1912, of Suit by Admiral Realty Company against the City of New York, the Commission and the Interborough Company.

The preliminary negotiations had hardly closed when the Admiral Realty Company brought a taxpayer's suit to enjoin the execution of the proposed contracts (*Admiral Realty Co. v. City of New York*, 206 N. Y. 110). Of the contentions relied upon by the plaintiff in *that* litigation, two are of importance in *this* litigation and one is of immediate moment here. The contention of immediate moment was that the City and the Commission, under the Rapid Transit Act, did not have the statutory power to enter into the *proposed* Contract 3, and the Elevated Certificate. *To meet this challenge, the* 1912 *amendments to the Rapid Transit Act were introduced into the State legislature.* These amendments were specially designed to dispose of all possible question as to the power of the City and the Commission to enter into the very contracts which afterwards were executed as Contract 3 and the Elevated Certificate. They specifically authorized the inclusion in the Contracts, *both* with respect to Subway and Elevated lines, of all the special provisions on which the parties had informally agreed, such as the compensation to be paid for Subway and Elevated lines, the leveling of the leases, the privileges of recapture, the preferential payments, etc.[1] And they *re-enacted* the earlier provisions under which the fare stipulations, *both* in the Subway contract and the Elevated Certificate, were eventually made.

Introduction into the Legislature, on March 18, 1912, of Bill to Amend the Rapid Transit Act with Special Reference to Contract 3 and the Elevated Extension Certificate.

As the result of the suit by the Admiral Realty Company there was introduced into the Legislature by Senator

[1] Cf. Record, pages 274-626 with Sections 24 and 27 as then amended.

Robert Wagner on March 18, 1912, a Bill (Senate Bill No. 1277) amending the Rapid Transit Act with special and minute reference to the contracts proposed to be made between the City of New York and the Interborough and authorizing precisely such contracts as had been informally agreed upon and were awaiting execution.

While these amendments were pending in the Legislature and for the purpose of expediting action thereon, the Board of Estimate and Apportionment on March 21, 1912, passed, and transmitted to the Legislature, a Resolution requesting prompt legislative authority formally to enter into the contracts incorporating these terms *and specifically referring to the fact that these contracts would provide for "a single five cent fare."*

This Resolution was as follows (Record, pages 565-566):

> "Whereas, The Public Service Commission for the First District and the Board of Estimate and Apportionment of The City of New York have under consideration plans for the construction and operation of a system of *subway and rapid transit lines* that will extend rapid transit facilities to every part of the city and secure to the people an extension of service that will increase three fold the area throughout which passengers may be carried *for a single five-cent fare*; and
>
> Whereas, The plans under consideration when approved must give to the city the best possible returns for its own future investment in rapid transit lines; and
>
> Whereas, In order *to render possible the adoption of such plans it is necessary that the present rapid transit statutes be amended in certain particulars*; and
>
> Whereas, There is now pending before the Legislature an act amendatory of the rapid transit act, prepared by the Public Service Commission and designed *to permit the public authorities to enter into contracts for the construction, equipment and*

operation of rapid transit lines in accordance with the plans aforesaid, and upon the best possible basis to be secured to the city;

* * * * * *

Resolved, That the Board of Estimate and Apportionment of the City of New York earnestly urges upon the Legislature the importance of *the prompt passage of Senate Bill No.* 1277, *amending the rapid transit act and introduced by Senator Wagner on March* 18*th;* and be it further

Resolved, That the Secretary be directed, on behalf of this board, to forward copies of these resolutions to the President of the Senate and the Speaker of the Assembly, and that the Corporation Counsel be requested to represent this board at such hearings as may be given upon the bill in either house."

Amendments Enacted on April 9, 1912, *to the Rapid Transit Act.*

The Bill introduced by Senator Wagner, with modifications, became law, as Chap. 226 of the Laws of 1912, enacted on April 9, 1912.

These amendments, instead of curtailing the power of the Commission to enter into contracts or make certificates providing for a stipulated rate of fare proceeded infinitely further than the earlier statutes and *required* that the contract under which the new lines were to be constructed required them to be operated in connection with the earlier lines then under operation under Contracts 1 and 2 "*for a single fare.*"

Section 24, relating to the Elevated Extension Certificate, was also extensively amended with special reference to the Certificate then under consideration and eventually granted. These amendments have reference particularly to the rental to be paid for the additional tracks and extensions, which rental might consist of a proportion of the earnings of the lines in excess of previous earnings.

and also to the right of "Recapture" at the expiration of a specified time. It was *unnecessary* to alter the provisions which authorized the Commission to grant a certificate upon "such *other* terms, conditions and requirements as to the said Board may appear just and proper" because that provision was as broad and comprehensive as language could be, particularly since, by subdivisions 2, 3 and 4 of Section 24, those "terms, conditions and requirements" were declared to be "a contract" binding both parties, unless modified "by the Commission" "*with the consent* of such person, firm or corporation."

It is impossible here to quote in full the complicated provisions inserted by the Amendments of 1912 both into Section 24 and into Section 27 of the Rapid Transit Act for the express purpose of authorizing the execution both of Contract 3 and the Certificate. It is essential that the Court shall examine these amendments *and compare them* with the provisions of Contract 3 and the Certificate as they had been informally agreed upon *before* the amendments were enacted and as incorporated *after* their enactment in the Contract 3 and the Certificate.

Here it is only possible to point out that at the time the Legislature enacted these amendments it was for the express purpose of authorizing precisely such a Contract and Certificate that were *eventually* executed and that had been agreed upon *before*, because

1. The fact that each of these would contain a provision for a *single 5-cent fare* was not only a matter of public knowledge but had been *expressly* communicated to the Legislature by the Resolution of March 21, 1912, adopted by the Board of Estimate and Apportionment urging the prompt enactment of these amendments.

2. These particular contracts were *at that time* the subject of important litigation instituted by the Admiral Realty Company and then pending in the Courts, in which

the question of the single 5-cent fare was directly involved. The very purpose of the amendments of 1912 was to remove any possible doubt concerning the validity of *the very contracts* the full terms of which had been informally agreed upon and whose execution the plaintiff in that suit was attempting to enjoin.

3. The Legislature in these amendments *expressly referred* to the earlier contracts (Contracts 1 and 2) under which the existing lines *were then in operation at a 5-cent fare*. By the amendments of 1912 it expressly provided that Contract 3 might only be made "*if*" it should provide for "*a single fare*" over the entire system. This could only have meant that the 5-cent fare stipulated in Contracts 1 and 2, thus expressly referred to, should be "the single fare" over the entire line.

The facts thus brought to the attention of the Legislature with respect to the intention of the parties to execute a Contract and Certificate each containing provisions for a fixed 5-cent fare were such as to call for some legislative expression of disapproval if the Legislature intended not to sanction those agreements. Instead of expressing disapproval of the contracts thus intended to be made the Legislature in 1912 *re-enacted* both the provisions of Section 27 relating to the Subways and the provisions of Section 24 relating to Extension Certificates, which, as thus re-enacted, contain the broadest possible authority to the Commission and the City to contract concerning the rate of fare.

The history, therefore, of these amendments and of the litigation connected therewith can leave no rational mind in doubt as to the intention of the Legislature to vest the power in the Commission, the City and the Interborough Company, both as to Subway and Elevated Lines, to make binding contracts for an unchangeable five cent fare.

Section 27 as thus amended reads in part as follows (matter in parenthesis *ours*):

> "*If such contract be made* (a contract for the equipment, maintenance and operation of municipally constructed new lines—Contract 3) with a railroad corporation (the Interborough Company) organized for the purpose of maintaining and operating a railroad, including the equipment or any part thereof, constructed pursuant to the provisions of this chapter (the then existing lines), *and which has entered into a contract or contracts for the maintenance and operation of a railroad or railroads theretofore constructed in whole or in part at the expense of the city as in this act provided* (Contracts 1 and 2), *and is engaged in the maintenance and operation of the same within such city*, and if such contract (Contract 3) shall make provision for the equipment, maintenance and operation of such road or roads of the city (municipally constructed new lines) in connection with the said railroad or railroads theretofore constructed as aforesaid (the then existing lines) and at the expense of the city, *and for a single fare*, the said corporation and the city may in such contract or by modification of an existing contract or contracts (Contract 3) provide that the original term of any contract for operation of the said railroad or railroads theretofore constructed in whole or in part at the expense of the city (Contracts 1 and 2) may be extended, etc."

Section 27 as thus *re-enacted in 1912* also provides:

> "Contract for equipment maintenance and operation of road. The Public Service Commission shall, *subject to the approval* of the Board of Estimate and Apportionment or other analogous local authority of such city, have *full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads* • • • constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter and may, with like approval, *enter into a contract* with any person, firm or corporation who or which in the opinion of said commission shall be best qualified to fulfill and carry out said contract."

And again:

> "*Every such contract shall contain such terms and conditions as to the rates of fare to be charged* and the character of services to be furnished and otherwise *as said commission shall deem to be best suited to the public interest* and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, *with like approval.*"

With respect to the Elevated Certificate, Section 24, as *re-enacted in 1912*, provides:

> "The Public Service Commission may also from time to time *with the approval of the Board of Estimate and Apportionment* upon the application of any person, firm or corporation * * * fix and determine the route or routes by which any such person, firm or corporation * * * may extend his or its line or lines * * * and may *with like approval* authorize such corporation to construct, maintain and operate such extensions and may, *with like approval*, authorize any such person, firm or corporation to lay an additional track or tracks * * * for the accommodation of the travelling public * * * and to transport over the same passengers or freight or both * * * and the commission shall, *with like approval, fix and determine* the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefore to the city by said person, firm or corporation *and such other terms, conditions and requirements as to the said boards may appear just and proper.*"

It was further provided by Section 24 (Subdivision 2) that thereupon—

> "A certificate shall be prepared by the commission, attested by its seal and the signature of its presiding officer, *setting forth in detail the action taken by the commission* with respect to such connecting or extended route or routes and such tracks and facilities, *and the terms, conditions and require-*

> *ments aforesaid*, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification of the terms of the contract as hereinafter provided. Every such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the Supreme Court. Such certificate shall be delivered to said person, firm or corporation upon the receipt by said commission of *a written acceptance of said terms, conditions and requirements*, duly executed by said person, firm or corporation, so as to entitle it to be recorded."

Section 24 (subdiv. 4) further provides that the Certificate thus granted shall constitute a contract according to the terms of the Certificate:

> "The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed *to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate;* and such contract shall be enforcible by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time *with the consent of such person, firm or corporation be modified by the Commission.*"

Both by Section 27 and Section 29 the Legislature expressly provided for the protection of the rights of the City in the event that the operating corporation should fail to perform the terms of the operating contract.

By Section 27 (subdivision 8) it was provided:

> "The said contract shall further provide that in case of the failure or neglect on the part of said contracting person, firm or corporation, after such notice as the contract may prescribe, faithfully *to*

> ***observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by the public service commission, may either terminate the contract or take possession of said road and the equipment thereof,*** and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, and the said contract ***shall contain such terms, conditions and provisions in relation thereto as the said commission shall deem necessary or desirable for adequately safeguarding and protecting the rights and interest of said city.***"

By Section 29 (subdivision 3) relating to "terms of contract for construction *or* operation" it was also provided as follows:

> "Every such contract shall contain appropriate terms, conditions and provisions for safeguarding the interests of the city *in the event of the failure or neglect of such contracting person, firm or corporation to construct, equip, maintain or operate the railroad according to the terms of the contract*, and the public service commission may bring such action or actions in the name and in behalf of the city as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the public service commission seem just, and with such person or corporation as to the commission may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default."

By Section 38 the possible modification of any operating contract was provided for, which, however, could not be accomplished otherwise than *by agreement*, made with the operating company with the consent of the sureties on its bond:

> "MODIFICATION OF CONTRACTS. The public service commission for and on behalf of the said city in which such road or roads may be constructed, may, from time to time with the consent, in writing, of

the bondsmen or sureties of the person, firm or corporation which has contracted with said commission or its predecessors to construct, equip, maintain *or operate* any road or roads, *agree with the said contracting person, firm or corporation upon changes in and modifications of said contract*, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section."

Proceedings in the Admiral Realty Company Case After the Enactment of the Amendments of 1912, *and Decision by the Court of Appeals on June* 29, 1912, *Sustaining the Contracts.*

After the 1912 *amendments* the challenge of the power to contract was withdrawn by the plaintiff in the *Admiral Realty Co. case* and the brief of each party conceded that the passage of the amendment had conferred the power to enter into *all* the provisions of Contract 3 and the Elevated Certificate. *The Interborough was a party to the Admiral Realty Co. case, together with the Commission and the City of New York.* We quote from page 40 of its brief filed in the Appellate Division of the Supreme Court:

"POINT III.

"THE PROPOSED AGREEMENT IS NOT *ULTRA VIRES* OF THE CITY OF NEW YORK

"The appellant contended in the Court below that certain provisions of the proposed agreement were not authorized by the provisions of the Rapid Transit Act and were therefore *ultra vires* of the City. But the Rapid Transit Act has since been amended and *ample authority is found since the enactment of Chapter* 226 *of the Laws of* 1912, *for* ALL *of the provisions of the proposed agreements.* It is therefore assumed that this point will not be urged on this appeal."

The same view was uniformly taken by all the New York courts which passed on the case. In the Court of Appeals the matter was dismissed with brief comment (206 N. Y. 110, 124):

> **"It is proposed to execute the contracts under and in accordance with authority conferred by the legislature under the so-called Rapid Transit Act (Laws of 1891, chapter 4), and its various amendments. Originally it was urged that this act was not broad enough to authorize the contracts, *but since the commencement of the actions amendments have been made which concededly meet and destroy this claim*, and, therefore, the real question is whether the statute attempts to permit something which is in violation of the Constitution and, therefore, is itself unconstitutional."**

Scattered through the opinions of both Courts in that case are references to the agreement on *the single five cent fare* too numerous for reference.* Their combined effect overwhelmingly shows that all the New York courts as well as all the parties there, who are now parties here, assumed and recognized, as a matter of course, the power which the court below has failed to find.

Accordingly, the Court of Appeals on June 29, 1912, delivered an exhaustive opinion holding that Contract 3 and the Elevated Extension Certificate might properly be executed by the Commission and the City of New York and that they violated no Statutory or Constitutional rule of law (*Admiral Realty Company* v. *City of New York*, 206 N. Y. 110).

Execution of Contract 3 and the Elevated Extension Certificate on March 19, 1913, as Part of the Same Transaction.

Acting under the authority of the Rapid Transit Act as amended for that purpose in 1912 and the decision of

* Note—The "five cent fare," the "single fare" or the "five cent single fare" is referred to 9 times in the opinion of the Court of Appeals.

the Court of Appeals sustaining the validity of the Contracts proposed to be made, the Commission, the City and the Interborough Company executed Contract 3 and the Certificate on the same day (March 19, 1913) as a part of the same transaction. Although evidenced by separate instruments they represented the consummation of proposals made by the Interborough Company to the Commission and the City in which the execution of both Contract 3 and the Elevated Extension Certificate were offered jointly in consideration of the City's covenants.

That the Certificate and Contract were part of the same transaction and were interdependent is demonstrated by Article VIII of the Certificate which reads as follows:

> "The Commission in view of this Certificate *and in conjunction therewith*, has awarded or may award, subject to the approval of the Board of Estimate,
>
> (1) to the Manhattan Railway Company, being the lessor of the Interborough Company, a certificate of even date herewith authorizing additional tracks on Second Avenue, Third Avenue and Ninth Avenue, mainly in the Borough of Manhattan, City of New York, and
>
> (2) to the Interborough Company *a contract under or in pursuance of which a rapid transit railroad may be in part constructed, and may be maintained and operated* upon lines known respectively as Seventh Avenue-Lexington Avenue Line, Eastern Parkway Line, Steinway Tunnel Line and White Plains Road Line as in said contract described.
>
> and certain consents are or may be necessary to be procured under the terms of such certificate in order that the Manhattan Railway Company may have the right to construct, maintain and operate railroads therein described;
>
> It is now agreed, therefore, that *if said certificate or contract shall not take effect* or if the Manhattan Railway Company shall be released from such certificate through failure to procure any such consents

then this certificate hereby granted shall become null and void and the rights given hereby to the Interborough Company and all of its obligations hereunder shall cease and determine."

Contract 3.

Contract 3 was executed between the Public Service Commission and the Interborough Company, with the Approval of the City. In doing so the Commission was exercising its *contractual* authority under the Rapid Transit Act. The contract in its preamble declares that it is made

> "in consideration of the premises and of the mutual stipulations and covenants hereinafter contained, *and, under the authority of the Rapid Transit Act.*"

Article III of the contract also provides that

> *"This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein."*

By Contract 3 additional Subway Lines were agreed to be constructed. These new lines were to extend, approximately from Forty-second Street to Woodlawn and from Times Square along the west side of Manhattan into Brooklyn. The City thereupon leased the new lines to the Interborough upon the agreement of the Interborough that it would equip, maintain and operate the lines for a term of forty-nine years. The terms of the leases under Contracts 1 and 2 were maintained in full effect but were "leveled" so that they would expire simultaneously with the lease of the new lines to be thus constructed and operated (Contract 3, Article XLVII). Except as expressly modified Contracts 1 and 2 remained in full effect. Contract 3, Article 1, provides:

> "The City and the lessee further agree upon the *modification of Contract No. 1 and Contract No. 2* in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2 *except in the respect and to the extent herein specifically set forth.*"

The five-cent fare stipulated both by Contracts 1 and 2 was reaffirmed by Contract 3 and that rate of fare was extended to include *both the old lines and the new lines* that were to be constructed under Contract 3. Article XLVII provides (matter in parenthesis *ours*):

> "The city hereby leases the railroad (the lines to be constructed under Contract 3) and the equipment to the lessee or operation in conjunction with the existing railroads (the lines previously constructed under Contracts 1 and 2) and existing equipment *for a single fare*."

Contract 3 further provides (Article XLII):

> "The lessee shall *during the term of the contract* be entitled to charge for a single fare upon the railroad (the lines to be constructed under Contract 3) and existing railroads (the lines theretofore constructed under Contracts 1 and 2) *the sum of five cents but not more*."

It is important to observe the relations of the parties under Contract 3, particularly with respect to the division of earnings, because these provisions show that the preferentials accorded to the Interborough Company under Contract 3 were intended to secure the Interborough Company, even at the expense of the City's interest in the lines, against the diminution in its profits that, it was anticipated, would or might result *from the operation of the extended system at a single five-cent fare*.

These provisions are contained in Chapter II of Contract 3. Under those provisions the Interborough Company agreed to "contribute" not exceeding $80,000,000 toward the cost of construction of the new lines to be constructed under Contract 3 and agreed also to furnish the equipment to be used in connection therewith, title to which on delivery vested immediately in the City.

The theory of the contract was that the Interborough Company should be secured against the consequences of

the operation of the *entire* system at a single five-cent fare *by a preference*, as against the City, with respect to the earnings of the *entire system*, so that in no event would the Interborough Company receive less than its previous earnings under Contracts 1 and 2 and, in addition thereto, interest at the rate of five per cent. on its investment of $80,000,000 under Contract 3 together with one per cent. thereon with which to amortize that investment during the forty-nine year term of the lease. For any expenditures exceeding $80,000,000 the Interborough Company was to be permitted to deduct the actual rate of interest paid for the use of the money and, in addition thereto, one per cent. per annum with which to amortize such expenditure.

Accordingly, Contract 3 provides that the receipts of the new lines shall be combined with the lines theretofore constructed under Contracts 1 and 2 and that these combined receipts shall be applied as follows:

Operating expenses, including the rentals payable to the City under Contracts 1 and 2, and depreciation are first to be deducted and paid.

Then, in order to assure to the Interborough earnings from the operation of the extended system at a single five-cent fare at least equal to those previously received from the operation of the existing lines, $6,335,000 per year is to be deducted and retained by the Interborough

> "as representing the average annual income from the operation of the *existing* railroads,"

the *existing* railroads being those theretofore constructed under Contracts 1 and 2 (Contract 3, Article I, Sections 10 and 11).

Next, in order to assure to the Interborough a fair return on the amount, not to exceed $80,000,000, to be contributed by it under Contract 3 and, in addition, an

amount sufficient to amortize that contribution during the term of the lease, it is provided that the Interborough is to deduct and retain annually six per cent. on its contribution toward the cost of construction and equipment furnished under Contract 3

> "out of which the lessee shall set aside amounts sufficient, with interest and accretion thereon, to amortize within the term of the lease such contribution and such cost,"

it being estimated that five per cent. was to be the interest on the contribution and that one per cent., together with the interest and accretions thereon, would more than amortize the "contribution" within the term of forty nine years.

Next, to assure to the Interborough a fair return on any sums expended by it in excess of $80,000,000 it is to withhold from earnings, amounts, as calculated in subdivisions 8 and 9 of Article LXIX, to pay the actual interest upon and to amortize the cost of any expenditure exceeding $80,000,000 for any additional equipment and additions to construction.

Only after all these amounts have been paid, withheld and deducted is the City to have any share in the receipts. Then, and only then, is it entitled to 8.76% annually on its investment of approximately $114,000,000 in the lines constructed under Contract 3 (R. 895).

And after all these preferential payments have been made the City and the Interborough Company divide equally whatever remains.

Contract 3 contains provisions inserted pursuant to the requirements of the Rapid Transit Act (Section 27) by which the City may at any time after ten years (which have now expired) "Recapture" any or all of the lines constructed under Contract 3. These provisions are contained in Chapter VI of Contract 3 designated "Termina-

tion upon Notice." This in effect gives to the City a continuing option by which it may at any time after ten years from the beginning of operations acquire these lines. If it does so at the end of ten years it must pay the *actual cost* of the lines and fifteen per cent. besides. After ten years this percentage is diminished 1/39th for each year, so that at the expiration of forty-nine years the lines *revert to the City* without any payment whatever to the Interborough.

The Elevated Extension Certificate.

In executing the Elevated Extension Certificate of March 19, 1913, precisely as in the execution of Contract 3, the Commission was exercising its *contractual authority under the Rapid Transit Act*. The Certificate provides:

> "The word 'City' as used herein means The City of New York, and any other corporation or division of government to which the ownership, rights, powers and privileges of The City of New York *under the Rapid Transit Act* shall hereafter come, belong or appertain."

and that

> "The word (Commission) as used herein means the Public Service Commission for the First District of the State of New York, *in so far as it acts herein under the Rapid Transit Act*, or any official or public body to whom or to which the powers now *conferred upon the said Commission by the Rapid Transit Act* may hereafter be transferred by law."

The recitals of the Certificate also clearly refer to and follow the language of Section 24 of the Rapid Transit Act which conferred the power to contract, viz.:

> "Whereas, The Interborough Company • • • *under the provisions of the Rapid Transit Act has applied to the Commission* for authority to extend its lines (meaning thereby the Manhattan Railroad) within New York and to acquire terminal or other facilities, all as hereinafter described; and

> Whereas, Since in the judgment of the Commission the public interests so demand, the Commission has fixed and determined the route or routes by which the Interborough Company may extend its railroad and has fixed and determined the location and plan of construction of the Railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the City by the Interborough Company, *and such other terms, conditions, and requirements as to the Commission appear just and proper.*"

The Certificate was to endure for the term of 85 years unless sooner terminated upon notice given as provided in the Certificate after the expiration of ten years from the date thereof. At the expiration of the term of 85 years the additional tracks and extensions revert to the City without compensation to the Interborough Company (Certificate, Article XIII).

The Certificate follows closely the language of Section 24 of the Rapid Transit Act. In its recitals it declares:

> "Whereas, since in the judgment of the Commission the public interests so demand, the Commission *has fixed and determined* the route or routes by which the Interborough Company may extend its railroad and has fixed and determined the location and plan of construction of the Railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the City by the Interborough Company, *and such other terms, conditions and requirements as to the Commission appear just and proper.*"

Then, after specifying the manner in which the Interborough Company may extend and third-track its lines, the Certificate provides (Certificate, page 6):

> "Provided, however, and it is expressly agreed that the authorizations or licenses hereby granted *are subject to certain terms, conditions and requirements which appear to the Commission to be just and proper*, and which as so subject, are prescribed in the following articles, to wit:"

Among the "terms, conditions and requirements" of the Certificate, and the one which, it is safe to say, was regarded by the parties as its most important one, is the condition that *the entire system shall be operated "for a single fare"* of "five cents but not more." The Certificate, under "Rate of Fare," provides (Certificate, Article VI):

> **"The Interborough Company shall be entitled to charge *for a single fare* for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad *the sum of five (5) cents but not more*. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction."**

The "terms, conditions and requirements" of the Certificate were accepted by the Interborough Company on March 19, 1913, as follows (Certificate, page 46):

> **"The Interborough Rapid Transit Company hereby accepts the foregoing certificate *and all the terms, conditions and requirements thereof*."**

The Manhattan Railway Company also accepted the terms of the Certificate as follows:

> **"The Manhattan Railway Company hereby accepts the foregoing certificate *and all the terms, conditions and requirements thereof*."***

* NOTE—There is, accordingly, no force in the suggestion contained in the opinion of the District Court (Record, page 1976) that the Certificate granted *to the Manhattan Company* contained no provision fixing the rate of fare.

In the Certificate, again, the division of earnings between the City and the Interborough Company should be carefully observed, because it shows further recognition by the parties that the single five-cent fare would endure, regardless of consequences, during the entire life of the Contract and that the Interborough Company was protecting itself *against any diminution of profits that might result from the operation of the extended Elevated system at a single five cent fare.*

By the Extension Certificate it was provided that the City *should receive no part of the net earnings of the Elevated Lines, old or new, until those earnings should equal the previous earnings of the earlier lines* (Certificate, Article XII, sub-division 6) and, moreover, that the City's interest in such earnings should be *subordinate to the payment of interest and sinking fund on $47,000,000 of Bonds* (R. 898) issued to pay for the extensions and third tracks (Certificate, Article XII, sub-division 7). By making these extraordinary sacrifices the City purchased from the Interborough Company the five-cent fare stipulations contained in the Certificate.

Then, and only then, were the earnings *in excess of previous earnings as thus computed* to be equally divided between the City and the Interborough (Certificate, Article XII).

The Certificate (Article XIII) contains "Recapture" provisions similar to those contained in Contract 3, by which the City at the expiration of ten years after the beginning of operations under the Certificate may "Recapture" the additional tracks and extensions thereby authorized at the *actual cost* thereof and fifteen per cent. besides. After ten years this percentage is diminished 1 75th for each year, so that at the expiration of eighty-five years the additional tracks and extensions *revert to the City* without any payment whatever to the Interborough.

After the execution of the Extension Certificate the provisions of Chapter 743 of the Laws of 1894 became entirely immaterial. The *statutory* fare limitation theretofore imposed with respect to *a part* of the Interborough's System of Elevated Lines was superseded by the *contractual* rate expressed in the Certificate. Thereafter the repeal of Chapter 743 of the Laws of 1894 could have had no effect upon the rate of fare on the Elevated lines because the Interborough Company after March 19, 1913, was bound by the *contractual rate* stipulated in the Certificate.

Approval by the Board of Estimate and Apportionment of Contract 3 and the Elevated Extension Certificate.

Under *the express provisions of Sections* 24 *and* 27 of the Rapid Transit Act neither Contract 3 nor the Certificate could be executed by the Commission except *"with the approval of the Board of Estimate and Apportionment"* of the City of New York.

That "approval," when it was granted, was expressly conditioned upon the two contracts (Contract 3 and the Certificate), both of which, of course, contained provisions for a five cent fare.

The approval of Contract 3 by the Board of Estimate and Apportionment was granted by Resolution of the Board adopted March 19, 1913, in which there was incorporated a copy of Contract 3. After reciting the entire contract it was Resolved that the Board

> "approves and consents to the proposed contract to be entered into with the Interborough Rapid Transit Company." (Record, page 685.)

On the same day the Elevated Extension Certificate was approved by Resolution, which also set forth in full a copy of the Certificate and by which it was Resolved that the Board

> "hereby consents to the construction, maintenance and operation of the railroad extensions in accordance therewith." (Record, page 679.)

It is unthinkable that when the Legislature provided that no Contract or Certificate could be executed by the Commission except with the "*approval*" of the City, it intended that either of these should be subject to immediate alteration in their most essential provisions under the regulatory powers of the Commission *without the* "*approval*" of the City, or by a Federal Court against the opposition of both the Commission *and* the City.

The Interborough Company's Application for an Increased Fare on the Subway Lines, Made to the Public Service Commission in 1920.

On May 28, 1920, the Interborough Company made application to the Public Service Commission of the First District for an increase of fare "on its *subway* (not its elevated) lines" (Record, page 1023). That application was made *under Section 59* of the Public Service Commission Law (Record, pages 1023, 1024). After hearing counsel the Commission determined that it had no jurisdiction in the premises and

> "Ordered that said complaint be dismissed and said petition of Interborough Rapid Transit Company be and the same hereby is denied for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3 referred to in said complaint." (Record, page 1024.)

Thereupon judicial proceedings were instituted by the Interborough Company to review the action of the Commission in refusing jurisdiction (Record, page 1071). Certiorari proceedings were instituted; a preference on the hearing of the Writ was granted by the Appellate Division of the Supreme Court, of which, however, the Interborough Company did not avail itself; a brief of 101 printed pages was prepared by the Interborough Company, presenting the very issues presented here, and finally, about two years thereafter, *the Interborough Company discontinued the proceedings*. All these record facts, and many others, bearing on this application are set forth

without dispute in the affidavit of M. Maldwin Fertig (Record, pages 1071-1075).

The Interborough Company's application having been thus denied, *Contract 3 remained in full effect.*

Amendments of 1921 to the Public Service Commission Law.

In 1921 (Chapter 134 of the Laws of 1921) there were enacted important amendments to the Public Service Commission Law. These consisted of:

(a) The *substitution* of the Transit Commission for the Public Service Commission of the First District with respect to transit matters over which the Public Service Commission had theretofore exercised jurisdiction within the First District (the City of New York).

(b) The *enactment* of (a new) Article VI of the Public Service Commission Law under which the Transit Commission was directed to undertake the preparation of a Plan of Rendjustment of transit facilities in the City of New York "for the relief of the emergency which is hereby declared to exist".

(c) The *amendment* of Section 49 of the Public Service Commission Law.

(a)

By the enactment of a new section (4-a) the Transit Commission (consisting of three commissioners to be appointed by the Governor) was established and by Section 5-a was vested with such jurisdiction over transit matters "within a City containing a population of over one million inhabitants" (New York City) as had previously been exercised by the Public Service Commission. In consequence, the jurisdiction of the Public Service Commission was continued with respect to Gas, Electric Light, Steam, Telephone and similar corporations within New

York City and it was divested of its previous jurisdiction over transit matters in the City of New York, which was transferred to the Transit Commission.

(b)

It is important that the Court shall read the provisions of Article VI, newly enacted in 1921, which is described in the Statute as "*Additional* powers and jurisdiction of Transit Commission," because without a full comprehension of Article VI the significance of the contemporaneous amendments to Section 49 and its subsequent amendment in 1922 are not intelligible. By Article VI the Legislature undertook to provide for the preparation and, if possible for the execution of a Plan of Readjustment of transit in New York City to relieve the existing "emergency" in transportation either by the acquisition of the lines by the City by "Recapture" or otherwise *or by new contracts with the transit companies* modifying the Rapid Transit Contracts previously executed and which are in litigation here. In other words in this respect the Commission *was to act in its contractual capacity*.

The definitions in Article VI (Section 105) immediately disclose the intent to deal comprehensively with the rapid transit situation in New York City. By subdivision 1 the "Rapid Transit Act" is expressly defined to be the Rapid Transit Act of 1891. By subdivision 4 the applicability of Article VI is limited to "a city of the State having a population of over one million inhabitants." By subdivision 6 the term "contract" is declared to include the various forms of contract authorized by the Rapid Transit Act. And finally, by subdivision 7 it is provided that the word "Railroad" shall include "Rapid Transit Railroads."

Article VI contemplates (1) the preparation of a Plan of Readjustment to be promulgated after public hearings thereon and (2) the execution of agreements, if agreements are possible, between the Commission and the Transit Companies affected, to carry such a Plan into effect.

The question of the rates of fare to be provided for by any such new contracts modifying the earlier Rapid Transit Contracts was to be considered by the Commission *but only in connection with the Plan and any new contracts executed pursuant thereto.* Section 106 provides that among the purposes intended to be accomplished *by the Plan and any new contracts* is

> "the assuring to the people of the City the *continued* operation of the railroads *at the present or lowest possible fares consistent with the just valuation of the railroads* and their safe and economical operation".

By Section 108 it is provided that this may be accomplished by *new contracts with the Companies modifying the earlier Rapid Transit Contracts:*

> "The Commission from time to time *may agree with railroad companies upon changes in and modifications of the terms and conditions of any contract under or pursuant to which any railroad or any part thereof has been or is to be constructed, equipped, maintained or operated or such contract may be cancelled and replaced by a new contract to include the railroads embraced in such existing contract.*"

Before executing any modification of these Rapid Transit contracts the Commission is required by Section 107 to hold public hearings and to submit the proposed contracts, for approval, to the local authority (the Board of Estimate and Apportionment). If the local authority refused to approve such new contracts the Commission might nevertheless have executed and delivered them (*prior to the amendment of* 1925) notwithstanding such refusal to approve. Section 107 provides:

> "Before finally fixing the terms and conditions of any contract required to carry out the plan the Commission shall hold a public hearing in accordance with the provisions of Section 37 of the Rapid Transit Act. * * * If within thirty days after the date of the first meeting of such local authority

> following the receipt of such contract or contracts, so resubmitted, the local authority shall refuse or neglect to approve the same * * * *the Commission may in the name and in behalf of the City execute and deliver such contract or contracts with full legal force and effect as if all approvals by the local authority and by any local officer had been given* * * *."*

It is apparent, therefore, that the Legislature regarded the fare provisions and the other provisions of these Rapid Transit Contracts as only susceptible of alteration under the *contractual* authority expressly vested for that purpose in the Commission by Article VI, which contractual authority, however, it was provided (Section 107) might, but *only* in connection with the Readjustment of transit facilities, be exercised *without the approval* of the City of New York. These provisions, authorizing these Rapid Transit Contracts *to be modified by contract without approval* of the City were abrogated by further legislation in 1925, as will hereafter be shown.

(c)

It will be observed that Section 49 contained special reference to the regulation of fares "authorized by general or special *statute*," but contained no reference to fares established by "*contract*" or "*franchise condition*" or "*other agreement*."

By the amendments of 1921 the Legislature amended Section 49 so that the clause which theretofore read and now reads

> "notwithstanding that a higher rate of fare or charge has been heretofore authorized by general or special statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

was amended to read as follows:

> "notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statute, *contract, grant, franchise condition, consent or other agreement,* and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. *Any such change in rate, fare or charge shall be upon such terms, conditions or safeguards as the commission may prescribe.*"

thus giving color to the contention that, by this amendment, the Commission was given *power*, although upon such "safeguards" as it might prescribe, to alter a rate of fare stipulated by a

> "contract, grant, franchise condition, consent or other agreement"

If it be true, as the Appellee has contended, that this change was inserted into the statute in order to bring these Rapid Transit Contracts under the jurisdiction of the Commission it furnishes the most convincing evidence possible that the Legislature did *not* consider them to be within the jurisdiction of the Commission *before the amendment of 1921 when the Statute stood precisely as it stands today.*

The Interborough Company's Application for an Increased Fare Made to the Public Service Commission on March 22, 1922, and the Amendment on that day, of the Public Service Commission Law.

Attempting to avail itself of the amendment of 1921 to Section 49, the Interborough Company in March, 1922, prepared to make application for an increased fare. This application, like the earlier application of 1920, was *under Section 49* of the public Service Commission Law, but, unlike the earlier application, was made *both* with respect to the Subway *and* the Elevated Lines (Record, pages 1024, 1025).

When it became known that the Interborough intended to contend that the amendment of 1921 to Section 49 was applicable to its Rapid Transit Contracts with the City and that it intended to apply to the Commission for an increased rate of fare, the Legislature immediately on March 22, 1922,—*the* **same** *day the application was filed*—enacted an amendment to Section 49 (Chapter 153 of the Laws of 1922) *so as to forbid the increase of such contract rates except as part of a Plan for the Readjustment of Rapid Transit Lines* by adding at the conclusion of the provision which then read

> "notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statute, *contract, grant, franchise condition, consent or other agreement* and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed"

the following:

> "*provided*, however, *anything herein contained to the contrary notwithstanding*, that, except in the case of a common carrier *other* than a street railroad corporation, not proposed by the commission to be included in the plan of readjustment under the provisions of Article VI of this chapter, the *transit commission shall not increase or authorize the increase of any rate of fare prescribed by any such general or special statute, contract, grant, franchise, conditions, consent or other agreement except as part of and as may be provided in such Plan of Readjustment.*"

The Legislature then, beyond question, declared its determination not to permit these Rapid Transit Contracts to be alterable by the Commission under its *regulatory* powers but only by the Commission *acting in its contractual capacity* under the provisions of Article VI, which contemplated the execution of *new contracts with the transit companies* modifying those previously executed.

Power to grant an increase being thus expressly withdrawn by Chapter 153 of the Laws of 1922, the Transit Commission refused jurisdiction and entered an Order providing as follows (Record, pages 1024, 1025):

> "The Interborough Rapid Transit Company having by petition, verified March 22, 1922, made application to the Commission for authority to increase the rate of fare charged on the subway and elevated lines operated by it, and the Commission having been advised by counsel that it is without jurisdiction to entertain said application owing to the provisions of Section 153 of the Laws of 1922 amending the Public Service Commission Law;
>
> Ordered that the said application of the Interborough Rapid Transit Company verified March 22, 1922, be and the same hereby is in all respects denied for lack of jurisdiction."

It was conceded by Mr. Ransom on the argument of this appeal (October 17, 1928, Stenographic Minutes, page 189) that the Transit Commission in 1922 had no power to grant the Interborough Company's petition for an increased fare. Mr. Ransom said:

> "That is, when the 1922 petition was filed, *the Company was met on that day*, by some peculiar circumstances in Albany—with the taking effect of an amendment that provided *that the Commission should not have power any more to increase the rate of fare on these subway and elevated lines*, except as a part of a Plan of Readjustment and Unification of the rapid transit system. *Well, that did not leave much basis for that petition;*"

No review, judicial or otherwise, was sought by the plaintiff with respect to the action taken by the Commission in 1922.*

* NOTE—It is important to observe that until the proceedings instituted by the plaintiff on February 1, 1928, no application was ever made to the Commission to increase the rate of fare on the Elevated Lines that the Commission, *even according to the plaintiff's contentions, could have entertained*. The application of 1921 related, as we have shown, *only to the Subway Lines*. The application of 1922, which included the Elevated Lines, was made when the Commission *concededly* had no jurisdiction to entertain the application.

The Interborough Company's Application having thus again been denied *Contract 3 and the Elevated Certificate remained in full effect.*

Amendment of 1923 to Section 49 of the Public Service Commission Law.

In 1923 (Chapter 891 of the Laws of 1923) the Legislature again emphasized its intention to withhold from the Commission power to regulate such contract rates *and again amended Section 49 by striking out the words*

> "contract, grant, franchise, condition, consent or other agreement",

which had induced the Interborough Company to apply for an increased fare in 1922. At the same time the Legislature eliminated the proviso above referred to which had been introduced in 1922 (Chapter 153 of the Laws of 1922), thus restoring Section 49 to the form in which it stood before the amendment of 1921. Having eliminated all reference to any possible regulation of fares stipulated by

> "contract, grant, franchise, condition, consent or other agreement"

the limitation expressed in the "proviso" *appertaining thereto* was no longer either necessary or appropriate. If the Legislature had intended that rates agreed upon by contracts made pursuant to the Rapid Transit Act should be subject to regulation, it would, of course, have eliminated the "proviso" and *permitted the provision with respect to*

> "contract, grant, franchise, condition, consent or other agreement"

to remain. In other words it would have left the provision in the form in which it stood as the result of the amendment *of 1921*, under which the Interborough Company in March, 1922, had prepared to apply for an in-

creased fare. That it did not do so, with full knowledge that the Interborough Company *had attempted to secure an increased fare under that provision in* 1922, demonstrates that the Legislature did not intend to delegate such authority to the Commission.

The Interborough Company's Memorial of 1925 to the Legislature of New York State.

On March 3, 1925, the Interborough Company memorialized the Legislature asking that an increase in its rate of fare be authorized *by the Legislature*. This appeal to the Legislature was made *upon the theory that action by the Legislature with respect to the rate of fare agreed upon in the Rapid Transit Contracts was necessary because power to act had not been delegated to the Commission*. This Memorial is of the greatest significance as disclosing the Interborough Company's conception of the jurisdiction of the Transit Commission which has not since been changed by law.

On February 16, 1925, the Governor of New York State had submitted to the Legislature the report of Mr. Justice McAvoy which contained recommendations for improvements upon the Rapid Transit Lines of the Interborough Company, which if installed would, it was stated, necessitate capital expenditures of approximately $25,000,000 (page 1197) and would impose, it was claimed, additional fixed charges and operating expenses of about $4,000,000 a year (Record, page 1197).

After reciting difficulties alleged to have confronted the Company preceding the year 1922 (Record, page 1198) and which resulted in a reduction of the rental payable to the Manhattan Company for the Elevated Lines and of the wages payable to the employees of the Interborough Company, the Memorial proceeds (Record, page 1198):

> "The plan was adopted almost unanimously and it was believed that the Company could carry out its contract at the agreed rate of fare. Indeed, its

> credit was affected favorably enough to enable it to purchase 350 new subway cars through the sale of its Car Equipment Certificates aggregating $6,500,000."

It was stated, however (Record, page 1199):

> "As a result, while the market price of its bonds has advanced from 47 in 1921 to 71 in 1925, the Company cannot sell its bonds at a price which will enable it to raise $25,000,000 or any other large capital sum."

The amendments to the Public Service Commission Law of 1921, 1922 and 1923, heretofore referred to are then considered in a paragraph that confirms in most respects the construction which we have placed upon those significant amendments. It was stated (Record, page 1200):

> "These two public bodies (the Transit Commission and the Board of Estimate and Apportionment of the City of New York) *have the legal power by concurrent action to amend the contracts between the City and the Company* and in such manner as to permit it to procure the funds with which to carry out their proposals, but all efforts in that direction have failed to accomplish any such result. They have both publicly declared their opposition to any change in the rate of fare prescribed in the contracts of 1913. In 1918, 1919 and 1920 this company, without success, urged the city administration to consent to a change in the rate of fare. In 1921 statutes were enacted which authorized the Transit Commission *to increase the rate of fare in a proper case* without the consent of the city administration,* *but the Transit Commission declined to exercise that authority in* 1921 *and again in* 1922. *Indeed, in* 1922 *and in* 1923 *the Transit Commission procured changes in the statute of 1921 which were intended to deprive the Commission of such authority.* Thereupon this company carried through its readjustment plan of

* NOTE—Could it be more clearly stated that *prior to 1921* authority to increase the rate of fare did not exist. And yet Section 49, *since 1921 reads exactly as it did prior to 1921.*

> 1922 and upon its consummation a *public announcement was made that it was the purpose of the company to carry out the contracts with the city without change and without further request for change.* That purpose has been strictly adhered to up to the present time."

Proceeding directly on the theory that after the amendment of 1922 the Transit Commission had no authority to modify the rate of fare, the Interborough Company appealed to the Legislature to exercise *its police power* to increase the fare which was thus conceded not to have been delegated to the Transit Commission. It said (Record, pages 1200-1201):

> "*For this reason* this memorial is addressed to the supreme executive and legislative branches of the government of the state. The sovereign power of the state rests in those branches. That power, commonly called the police power of the state, is paramount. Its exercise, *with the consent of this company*, establishing a just and reasonable rate of fare, is binding upon the city administration according to the decisions of the Supreme Court of the United States, any provision in the contracts between the city and this company as to the rate of fare to the contrary notwithstanding. Contract rights of the city must give way when the public welfare requires a change in order to produce rates which are reasonable and necessary in the public interest. Indeed, all contracts of the city relating to the subways are entered into subject to the exercise of the police power of the state in a proper case.
>
> His Excellency, the Governor, and the Honorable, the Senators and Members of the Assembly of the State of New York, are therefore respectfully advised of the facts stated herein *and requested to enact such statutes* as to them may seem fitting and appropriate in the circumstances."

Again it was stated (Record, page 1204):

> "There is therefore, no question of local sovereignty or of home rule involved, any more than

> if the Legislature and Governor were to enact a statute prescribing the rate of fare to be charged upon the rapid transit lines leased from the Manhattan Elevated Railway Company. The city as a railroad corporation has leased the subway for a rental to be paid when and if earned. The revenues are insufficient to produce a return to the lessor railroad corporation and the lessee has requested the lessor to consent to a higher fare and it will not consent. The public welfare requires a higher fare. In such a case should the Legislature and Governor hesitate *about enacting a statute fixing a reasonable rate of fare?*"

In order to secure further legislation, which *was conceded to be necessary in order to permit an increase in the rate of fare*, the Interborough Company made the following proposal with respect thereto (Record, pages 1204, 1205):

> "This company is willing and requests that the statute shall provide *for impounding the amount of increase* in the rate of fare enacted so that it may receive no return greater than what the statute may declare necessary to enable it to render adequate service and make such additions and betterments as may be found necessary or advisable by the public authorities having jurisdiction of the matter. Provision should be made that the city investment at once become self-sustaining and that the credit thus available be used for subway building on a large scale."

The importance of this Memorial as disclosing the Interborough Company's own interpretation of the jurisdiction of the Transit Commission, *which has not since been changed*, requires no comment from us. It discloses also the intent of the Legislature which, by failing to act on that Memorial, manifested its determination, as plainly as can be, that the fare provisions of the Contracts should remain unchanged except under a Plan of Readjustment.

Amendment of 1925 to Article VI of the Public Service Commission Law.

Instead of complying with the Interborough Company's Memorial the Legislature, by Chapter 641 of the Laws of 1925 (enacted one month thereafter) amended Article VI of the Public Service Commission Law by introducing Section 112 at the conclusion thereof. That section expressed conclusively the legislative intent that these Rapid Transit contracts should not be subject to alteration *even under the contractual powers of the Commission under a Plan of Readjustment, without the approval of the City of New York.* Section 112 provides:

> "APPROVAL OF CONTRACTS TO EFFECTUATE PLANS OF READJUSTMENT. Anything contained in this chapter to the contrary notwithstanding, *the transit commission shall not execute and deliver any contract or contracts to effectuate any plan of readjustment therein provided for without obtaining the consent and approval of the board of estimate and apportionment, or other local authority of such city.*"

If the Legislature thus unmistakably withheld power from the Commission to revise these Rapid Transit contracts *in any particular* without the consent of the City of New York, whose approval to the execution of such contracts was in the first instance required by the Rapid Transit Act, how can it be assumed that it was intended that the Interborough Company might do this against the opposition *both* of the Commission and of the City.

Schedules or Tariff Sheets Filed by the Plaintiff on August 15, 1925, Showing Five-cent Rate of Fare on its Subway and Elevated Lines.

Pursuant to the authority vested in the Commission by Section 28 to "prescribe" "*the form* of every such schedule" and also to "prescribe by Order such changes in *the form* of such schedules as may be found expedient," the Commission on February 18, 1918, entered an Order prescrib-

ing *the form* of schedules thereafter to be observed [Complaint, Par. XVI (c), Record, pages 23-24] in part as follows:

> "Further ordered that the regulations hereinbelow set forth be, and they hereby are, prescribed as to *the form, construction, and filing* of schedules, fares and charges."

This, of course, did not prescribe *the rate* at which the schedules should be filed, but only *the form* to be used. The Interborough Company might, except for its contract obligations, have filed its schedule at five cents or at fifty cents or at any other rate that it saw fit, subject, of course, to action by the Commission thereon.

The plaintiff "both prior to and after March 19, 1913" (Record, pages 24-25), had filed its "tariff schedules showing the rates, fares and charges for the transportation of passengers" (Record, page 25) at the contractual rate of 5 cents per passenger. Thereafter *on August 15, 1925*, the plaintiff in compliance with the obligations of its contracts and consistent with the statement in its Memorial to the Legislature made a few months previously (March, 1925) that

> "a public announcement was made that it was the purpose of the company *to carry out the contracts with the City without change and without further request for change*"

voluntarily filed its schedules at a five-cent rate of fare to become effective on September 15, 1925 [Complaint, Par. XVI (*f*) and (g), Record, pages 24-25]. By these schedules, identified as "I. R. T. No. 2" *it cancelled its earlier schedules* "I. R. T. No. 1." This is alleged in the complaint as follows (Record, pages 24, 25):

> "*the plaintiff duly published, posted and filed with the said Transit Commission*, or its predecessors in office, both prior to and after March 19, 1913, tariff schedules showing the rates, fares and charges for the transportation of passengers and all regulations

> relating thereto applicable to the rapid transit railroad lines operated by the plaintiff; and more particularly a tariff schedule identified as '*I. R. T. No. 2—Cancelling No.* 1,' being Local Passenger Tariff No. 2; applicable within the Boroughs of Brooklyn, Manhattan, The Bronx, and Queens, New York City * * * issued by Frank Hedley, President and General Manager; * * * posted August 15, 1925, and effective September 15, 1925."

In consequence, the rate of fare on the Interborough Company's Rapid Transit Lines in New York City was, by the schedules thus filed on August 15, 1925, ***established by the Interborough Company at five cents after September*** 15, 1925. It is so alleged in the complaint (Record, page 25) as follows:

> "(g) In and *by said Tariff Schedule I. R. T. Co. No.* 2, and particularly by the sheets thereof identified as First Revised Sheets Nos. 2 and 3-A, *issued August* 15, 1925, *and effective September* 15, 1925, *the rate of fare on the rapid transit railroad lines operated by the plaintiff*, between any two stations of the same division (as therein described), or between a station of one division and a station of the other division as provided in the 'Transfer Points' (as therein described), *was fixed and prescribed at five cents per passenger.*"

Regardless, therefore, of any other consideration the Interborough Company, after filing its schedules at a five-cent fare in 1925, could not, even by Certiorari proceedings in the State Courts, have proceeded against the fare thus "established" on account of the action of the Commission in 1920 (applicable to the Subways *only*) or 1922 (at which time the Commission *concededly* had no such jurisdiction) with respect to earlier schedules which were *cancelled* by the schedules filed in 1925. In order to do this it was necessary to *institute fresh proceedings before the Commission* for an increase in that fare, because under Section 33 of the Public Service Commission Law the schedules filed in 1925 were the schedules *"filed and in effect at the time"*—February 1, 1928.

Proceedings Instituted by the Interborough Company on February 1, 1928, Under Section 29 of the Public Service Commission Law to Secure an Increased Fare by the Filing of Amendatory Schedules.

On February 1, 1928, the Interborough Company filed with the Commission new schedules annexed to the Complaint (Record, pages 122-128, marked Schedules J, K, L, M and N), to become effective on March 3, 1928, and purporting to cancel its schedules of 1925 then in effect. By these amendatory schedules purporting to cancel the earlier ones the plaintiff alleges that it "established," effective March 3, 1928, a "fare of seven cents per passenger" (Complaint, Paragraphs XXXII, XXXIII, Record, pages 39-40).

The affidavit of William L. Ransom, Counsel for the Interborough Company, makes it plain that the schedules of 1925 showing a five-cent rate of fare, *were, concededly, in effect at the time the Interborough Company on February 1, 1928, filed its new schedules at the increased rate.* He says (Supplemental Record, pages 91-92):

> "It is likewise true that on February 1, 1928, the Interborough Company filed with the Transit Commission amendatory schedule leaves which, under the requirements of the statute and the regulations of the Commission, will on March 3rd *cancel and supersede the schedule leaves theretofore in effect, such amendatory sheets being as follows.*"

At the same time that the Interborough Company filed these amendatory schedules it filed also a document in the nature of a brief that covers fifty-five pages of the printed Record (Record, pages 926-981) citing authorities which, it contended, sustained its contention that its Contracts were subject to modification by the Commission. This document also contained an appeal to the *discretionary* powers of the Commission under Section 29 to permit the amendatory schedules to take effect upon not

more than five days' notice (Record, pages 928, 929), concluding as follows (Record, page 980):

> "Wherefore, the Interborough Rapid Transit Company respectfully applies to your honorable Commission, *pursuant to the powers which have been vested in you by law,* to approve the said Thirteenth Revised Sheet No. 1 to I. R. T. No. 2, Original Sheet No. 2A, Original Sheet No. 2B, Second Revised Sheet No. 3, and Second Revised Sheet No. 3A, cancelling Twelfth Revised Sheet No. 1 (effective January 21, 1928) and First Revised Sheet No. 3 and First Revised Sheet No. 3A (effective September 15, 1925); and that you grant permission to the Interborough Company *to put the said tariff sheets into effect upon not more than five days' notice* after publication at stations and filing with the Commission."

Under Section 29 the Interborough Company's schedules filed on February 1, 1928, could under no circumstances become effective for *at least 30 days,** but it was provided (Section 29) that the Commission *in its discretion*

> "for good cause shown, *may* allow changes in rates without requiring the thirty days notice and publication herein provided for by duly filing and publishing *in such manner as it may direct an order specifying the change so made and the time when it shall take effect.*"

Letter of February 8, 1928, of James L. Quackenbush to the Commission.

After the filing of the amendatory schedules on February 1, 1928, and before the Commission had taken any action whatever with respect thereto, a letter was transmitted by James L. Quackenbush to the Commission on February 8, 1928 (Record, pages 129-131).

---

* Note—In fact it was stated in each of the Schedules (Schedules J, K, L, M, N; Record, pages 124-128) that they were to be effective March 3, 1928.

The questions presented to the Commission for determination by the filing of the plaintiffs' schedules on February 1, 1928, were:

1. The Commission's *jurisdiction* over the rates of fare stipulated in these Rapid Transit Contracts, and

2. *If* the Commission had such jurisdiction the *adequacy* of the five-cent rate.

Since the existence of the Contracts was not only not denied by the Interborough Company but was asserted in the Petition which it had filed (Record, pages 828-831) with the Commission, the jurisdiction of the Commission presented purely a question of law concerning which no proof would be necessary or proper. If the Commission should decide that *as matter of law* it had no jurisdiction over the rate of fare, *the question of fact* concerning the adequacy of the rate would be irrelevant.

It was fully recognized by Mr. Quackenbush in his letter to the Commission that the question of *the Commission's jurisdiction* over these Rapid Transit contracts was entirely a question of law concerning which no hearing was either necessary or desired. He said (Record, page 130):

> "Whether such a present effect as to any part of our Subway System is to be given to the 1913 contract *is, of course, a question of law which will have to be settled by the Courts.*"

Again he said (Record, page 131):

> "*If*, however, as this Company hopes, *you will definitely take jurisdiction of our rates* and proceed upon any proper complaint *to determine the facts* which will show whether or not our filed seven-cent rate is excessive, counsel for this Company will be glad to attend before you and arrange for the presentation of our contentions and proofs in the orderly course as above suggested."

This could only mean that a hearing was requested concerning the alleged inadequacy of the fare *"if"* the Commission should decide the "question of law" in favor of its jurisdiction and after "definitely taking jurisdiction of (our) rates" should proceed "to determine the facts" concerning the rate of fare.

Particularly was this true because the Interborough Company had theretofore filed with its schedules, a 55-page brief which, according to the affidavit of its counsel, William L. Ransom, was intended (Supplemental Record, pages 82, 83):

> "to place before the Transit Commission *a careful statement of the considerations of law and fact which had led the Interborough Company to file the amendatory schedule leaves for a seven-cent fare* and to hope for the favorable action of the Transit Commission."

Mr. Quackenbush's letter dated February 8th would in the usual course be received on the 9th. The 12th was Sunday, and accordingly Lincoln's Birthday (a legal holiday in New York) was celebrated on the 13th.

Letter of February 10, 1928, from the Commission's Special Counsel to the Interborough Company, Protesting Against the Use of the City's Funds for Expenses Incurred in Connection with the Company's Attempt to Break its Contract with the City.

This letter, which is referred to in the complaint as "an Order, direction and determination" (Record, page 89) is not "an Order" of any kind nor "a determination" of any person's rights, but consists of a *"protest"* against the use by the Interborough Company and a *"denial"* of its right to use funds belonging *to the City* as a result of the joint operation of the Rapid Transit Lines for the payment of its legal expenses incurred in connection with its attempt to break the Contracts with the City. The letter is written for the Commission acting in its *contractual*

capacity, objecting to the misapplication of the earnings of the lines *as provided in the Contracts* (Record, page 89):

> "I am instructed by the Transit Commission to advise you that it *protests and denies* your right to withdraw from the funds in your hands *as the result of joint operation* any money whatever for counsel fees, printing or other expenses in any way connected with the efforts of the Company to secure an increased fare, and that the Directors will be held personally liable for any such diversion of the funds of the Company. * * *
>
> I will be pleased to know at your early convenience whether you are prepared to accede to this point of view or whether it will become necessary for the Commission *to take steps to secure the enforcement of its rights in this direction.*"

It is self-evident that the "protest and denial" against the use of the City's funds in the possession of the Company "as the result of joint operation" for legal expenses is not an "Order" or "Determination" by the Commission that could, upon any theory impair any constitutional right. It is merely *notice* to the Company of the Commission's position that the funds payable to the City under the provisions of Contract 3 were being diverted under the pretense of payment for operating expenses, and that unless such misapplication were discontinued the Commission would "take steps to secure the enforcement of its rights in this direction." Not only is this not an "Order" or "Determination" by the Commission that could affect any person's rights but it is precisely the kind of notice which is required to be served by the Commission upon the Lessee, by Chapter VII of Contract 3.

Moreover, the use of the City's funds for legal expenses incident to breaking the City's Contracts is manifestly indefensible. The Interborough Company, of course, received directly from the public the earnings from the lines to be divided between the City and itself in accordance with the Contracts. Instead of making payment to the

City or crediting the City with the funds thus received, *it has withdrawn from the proceeds of the joint operations* the expenses so incurred. This situation is fully revealed in the affidavit of Samuel Untermyer and is not denied (Record, pages 900-901) as follows:

> "Among other things I have, as the result of such testimony and upon the basis thereof, *protested against the plaintiff taking advantage of the fact that it is in possession of the funds from joint operations under Contract No. 3 to extract from those funds large sums of money and to obligate the fund for additional large sums in the prosecution of this suit for the purpose of destroying the City's contract rights, thus using the money of the City to defeat the City's claims.*
>
> The Company has funds *of its own which I have insisted should be used for that purpose* instead of diverting the moneys that would otherwise be payable to the City on account of its accrued deficits."

And yet, incredible as it may seem, it is now attempted to convert the Commission's "protest" against this diversion of the City funds in violation of the Contracts into a basis for Federal jurisdiction.

Institution of this Suit by the Interborough Company on the morning of February 14, 1928.

Section 29 expressly provides that the Commission need not, *for 30 days*, take action with respect to any amendatory schedules filed, and, accordingly, no action of any kind had been taken by the Commission with respect to the plaintiff's schedules filed on February 1, 1928, at the time of the institution of this suit at 9.20 on the morning of February 14, 1928. (Record, page 1342.)

The Commission had *not* suspended the schedules. It had *not* denied the plaintiff's application for an increased fare. It had *not* refused a hearing even concerning the adequacy of the five-cent fare, assuming that such a hearing could have been allowed. All these questions were undetermined when at 9.20 on the morning of February

14th the plaintiff instituted this suit (1) to restrain the Commission from taking action upon the very application that the plaintiff had made and (2) to restrain the Commission and the City as *contracting* parties to Contract 3 and the Certificate from enforcing those contracts by *judicial* proceedings in the courts of New York State.

Decision and Order of the Commission on February 15, 1928, on the Interborough Company's Application for an Increased Fare Made After the Institution of This Suit.

Within a few hours *after* the institution of this suit the Transit Commission met and decided that it had no jurisdiction over the rate of fare for the reason that these were covered by contracts between the Interborough Company, the Commission and the City executed pursuant to express statutory authority and that in any event Section 29 of the Public Service Commission Law, under which the Interborough Company was seeking to increase the rate of fare, was not applicable.

The decision of the Commission was expressed in the following opinion (Record, page 883):

> "On February 1st, 1928, the Interborough Rapid Transit Company filed with the Commission revised tariff sheets indicating an intention to charge seven cents instead of five cents on and after March 3, 1928, on the subways and elevated lines operated by it in the City of New York, and at the same time applying to the Commission to grant permission to put the revised tariff into effect upon not more than five days' notice. The application is made under Section 29 of the Public Service Commission as is shown by its terms. It is not made pursuant to any other provision of law and the only matter before the Commission is the application of Section 29. In my opinion, Section 29 is not applicable to the fare fixed by contracts between the City of New York and the Interborough Rapid Transit Company, nor to the fare fixed by the certificate granted by the Public Service Commission for the First District and accepted by the Inter-

borough Rapid Transit Company which fixes the fare on the elevated lines. The company is evidently proceeding on the theory that it may alter the fare fixed in the agreements solely by its unilateral act without securing the consent of the other parties to the contract. This theory is untenable. *The provisions for the five-cent fare to which the company agreed when it made its contract with the city can only be altered as provided by the contract itself with the consent of all the parties and until that is done the provisions in question stand as they did when the agreements were made in* 1913.

"It is clear that the five-cent fare is still the fare agreed upon and allowed by law and that it cannot be altered by the mere filing of tariff schedules. A seven-cent fare would be as much a violation of the contract and as unlawful on March 3rd, 1928, as it is today or has been for the past fifteen years.

"Under these circumstances it would be improper and meaningless for the Commission to make any order in furtherance of the application. Such action would not alter the five-cent fare.

"For the foregoing reasons the schedules should be rejected as unlawful *and the application dismissed.*"

Thereupon the Commission made the following Order (Record, pages 1136-1137) in which it directed Counsel to institute proceedings *to enjoin the violation of the fare stipulations of the Contracts* which the Interborough Company, *by filing its schedules at the increased rate* was threatening to disregard:

"Whereas the Interborough Rapid Transit Company on February 1, 1928, filed with this Commission certain revised sheets marked to become effective on March 3, 1928, and purporting to amend its tariff schedules, now on file with the Commission and showing a rate of fare of five (5) cents, so as to show a seven (7) cent fare proposed to become effective on and after March 3, 1928, as the rate of fare to be charged by it on the subway and elevated railroads operated by it; and

Whereas it appears that the rate of five (5) cents now charged and collected by said Company upon

the said railroads operated by it *is fixed by certain contracts heretofore entered into between said Company and The City of New York, which contract and rate is still in full force and effect;* and

Whereas the Commission has rejected said revised sheets as unlawful and of no effect; and

Whereas the Company threatens and is about to charge and collect on and after March 3, 1928, *a rate in excess of that fixed in said contracts and allowed by law and in excess of that shown in the schedules lawfully filed and in effect;* and

Whereas the Commission is of the opinion that, by reason of its said threat *to discontinue its practice of charging a five (5) cent fare and to charge a seven (7) cent fare on and after March 3, 1928, said Company is about to fail to do something required by law and is about to do something contrary to and in violation of law, it is*

Resolved that this Commission do, and hereby does, direct Counsel to this Commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of this Commission against the Interborough Rapid Transit Company for the purpose of having such threatened violation of law stopped and prevented either by mandamus or injunction."

The Commission having thus again refused to authorize an increase in the rate of fare *the Contracts remained, and are now, in full effect.*

Institution on February 14, 1928, of Three Suits by the City and the Commission in the Courts of New York State to Require the Interborough Company to Perform its Contract Obligations.

Under Section 9 of the Rapid Transit Act, so far as it is applicable here, the Transit Commission was required, whenever necessary, to defend the interests of the City under any contract executed by the Commission pursuant to the Rapid Transit Act. That section provided:

"It (the Commission) may sue in the name and behalf of the city, of which it acts as a Commission,

> It may, in the name of and in behalf of the said city *bring action for specific performance or may apply by mandamus to compel the performance within said city by any corporation or any person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under or by reason of any grant made or right acquired under this Act.* * * * Or it may in behalf of or in the name of said city bring actions to recover damages for any violation of contract or duty or for any wrong committed by any such corporation or person by reason of any nonperformance or violation of duty under the provisions of this Act, *or under any contract or stipulation made in pursuance of any provision of this act.*"

To the same effect are the provisions of Section 27 (subdivision 8) and of Section 29 (subdivision 3) of the Rapid Transit Act (page 33, *ante*).

Under Section 57 of the Public Service Commission Law it was provided:

> "Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, *or* is doing anything *or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law* or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the State of New York in the name of the commission for the purpose of having such violations or threatened violation stopped and prevented either by mandamus or injunction, etc."

It had been decided by the Courts of New York State that the Commission might institute judicial proceedings under Section 57 *to enjoin the violation of the legal obligations of a contract* and that the proceeding was not limited nor intended merely to execute an order made by the Commission (*Wilcox* v. *Richmond Light & Railroad Co.*, 142 App. Div. 44; affd. 142 N. Y. 515; *Public Service Commission* v. *Westchester Street R. R. Co.*, 206 N. Y. 209).

Accordingly, the Interborough having threatened to put into effect an increase over the contractual rate of fare, the Commission, in the exercise of the duty to uphold the Contracts imposed upon it, particularly by the Rapid Transit Act, instituted two equity suits and a proceeding under Section 57, in the Supreme Court of the State of New York entitled:

> Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant (Record, page 1362).
>
> The City of New York, acting by the Transit Commission, Metropolitan Division of the Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant (Record, page 1368).
>
> The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant (Record, page 1393).

These actions and the special proceeding were instituted by summons and complaint and by a petition verified and served February 14, 1928, the same day and within a few hours after the institution of this suit by the plaintiff. There were also served at the same time upon the Interborough Company Orders to Show Cause returnable on February 20, 1928, and temporary Orders restraining the Company pending the hearing of a motion for an injunction *pendente lite* from doing any of the acts as to which relief was demanded by the complaints and petition.

The object of both actions and of the special proceeding was to prevent the Company, by judicial proceedings in the Courts of the State of New York, from putting into effect the increased rate set forth in the schedules filed by it with the Transit Commission, *for the reason that, in so doing, the Interborough was violating its contract obligations.*

The relief demanded in each of these three suits is substantially identical (Record, pages 1365; 1372; 1399-1400) and consists *only of a prayer for a mandamus or injunction*

requiring the Interborough Company to perform, or restraining the Interborough Company from failing to perform, *the fare stipulations contained in Contract 3 and the Extension Certificate.*

One fact common to these three suits should be very clearly observed. ***None of the suits demands the enforcement of any Statute or Ordinance nor are they brought to enforce any Order of the Commission.*** They are instituted to enforce the fare stipulations of Contract 3 and the Elevated Extension Certificate. In other words, they are instituted by the Commission in its *contractual* capacity under the Rapid Transit Act, as a party to the Contracts and as the body authorized by Section 57 to institute *judicial proceedings* to require a public service corporation to perform its *contractual obligations*. This furthermore is demonstrated by the fact that the City of New York, which, of course, has no *regulatory* powers, was made a party plaintiff in two of the three suits.

The Interborough Company's Supplemental Complaint, Filed March 3, 1928.

Without leave of Court, as required by Equity Rule 34, the plaintiff on March 3, 1928, filed what is described as an "Amended and Supplemental Complaint" (Record, pages 129-138). A motion to strike out this Supplemental Complaint (*Supplemental* Record, pages 135-138) was denied (*Supplemental* Record, pages 145, 146).

The Transit Commission had consistently maintained that the plaintiff had no cause of action at the time it instituted this suit in the Federal Court, because, regardless of all other considerations, it was instituted *before* any action had been taken by the Commission on the plaintiff's application for an increased fare. It had further maintained that, regardless of all other considerations, the suit in the Federal Court was premature and that before appealing to the Courts of the United States for relief, the plaintiff was required to exhaust its remedy before the State administrative body to which it had appealed.

In an effort to cure these infirmities and to create a cause of action where none existed when this suit was begun, the Supplemental Complaint was filed. By the Supplemental Complaint it was alleged that *after* the institution of this suit the Transit Commission had

1. Dismissed "the said application of the plaintiff to the said Transit Commission of February 1, 1928" (Record, pages 131, 132) and

2. That on the same day and also *after* the institution of this suit the Transit Commission and The City of New York "contemporaneously undertook to bring two civil actions and a special summary civil proceeding in the Supreme Court of the State of New York" (Record, page 133).

It will be observed that *both* the essential facts upon which this suit is predicated occurred *after* the institution of this suit and are alleged, *and could have been alleged* only in the Supplemental Complaint.

Ancillary Suit Instituted by the Interborough Company in the District Court of the United States.

Upon the institution by the Commission and the City of the three suits in the State Court, the Interborough Company instituted an action (Record, page 1341), *ancillary* to this action, in the District Court of the United States demanding an injunction against the prosecution by the Commission and by the City of the three suits in the State Courts on the theory that *regardless of the merits of this suit* (in the Federal Court) the complaint in this suit had been filed and served *before* the summons and complaint in the State suits (Record, page 1350); that accordingly the right of the Federal court *to decide* the questions thus presented had first attached (Record, pages 1348-1349; also 1352-1353), and that the issues thus presented might not be determined in any proceeding in the Courts of the State until the Federal jurisdiction had been exhausted (Record, pages 1355-1356).

The motion for a preliminary injunction in the ancillary action was heard and granted by Judge Bondy, exclu-

sively upon the theory, however, as will appear from his opinion (*Supplemental* Record, pages 121-129) that *regardless of the merits of the principal Federal suit,* the Federal Court having first acquired jurisdiction of the parties, had exclusive power *to decide* the issues thus presented for determination. This also appears from the following recital of his Order (*Supplemental* Record, pages 130-131):

> "it appearing to this Court that the prosecution by the defendants constituting the Public Service Commission and the defendant The City of New York of the three suits hereinafter described, in the Supreme Court of the State of New York, in and for the County of New York, or other similar suits concerning the fare chargeable by the plaintiff, will, or tends to, *defeat or impair the exclusive jurisdiction of this Federal Court first attached in the original action pending in this Court*, and will, or tends to, interfere with the plaintiff's right to secure *a complete determination* of its constitutional, legal and equitable claims in the said original action *first brought in this Federal Court*, in respect to the subject-matter of rates chargeable by the plaintiff."

From that Order, which has no effect or influence on the issues involved in *this* (the principal) suit an appeal was taken to the Circuit Court of Appeals.

The same statement appears in Judge Bondy's opinion where the *Ancillary* Order is declared to be made, "without any consideration of the merits of the *original* action," and it is provided that the defendants might move to "vacate the injunction in *this ancillary action* if the plaintiff's application before the *statutory court* should be denied." (Supplemental Record, page 129.)

Of course, if the injunction Order in the case at bar should be reversed and the complaint eventually dismissed, the injunction in the ancillary action will perish in consequence.

Brief Analysis of the Relief Demanded by the Complaint and by the Supplemental Complaint and the Relief Granted by the Order Appealed From.

It is very important to analyze the prayer for relief (both in the Complaint and in the Supplemental Complaint) particularly in connection with the relief granted by the Order appealed from, because these serve to show what the plaintiff at the time it instituted this suit was seeking to enjoin. In this connection it should be remembered that at the time of the institution of this suit on February 14, 1928, the Commission might take action, either as a *contractual party* or as a *regulatory body*.

1. As a *contractual party* to Contract 3 and the Certificate the Commission and the City might institute judicial proceedings to enforce the five-cent fare stipulations in Contract 3 and in the Certificate.

2. As a *regulatory body* the Commission might (although it had not then done so) take action with respect to the amendatory schedules filed by the Interborough Company on February 1, 1928, to prevent the proposed increase from taking effect.

The Relief Demanded by the Complaint.

Accordingly, the Prayer for Judgment (Record, pages 94-97), demands that the Commission be restrained in *both* capacities. That demand, in part, is covered by general allegations which do not clearly distinguish the contractual from the regulatory powers of the Commission (paragraphs 1 to 6 of the Prayer for Judgment), but which, if granted, would plainly enjoin the Commission from exercising *either* power. By subdivisions (6) and (1) of paragraph 7 of the Prayer for Judgment (Record, pages 96 and 97) the distinction is more clearly drawn.

By subdivision (6) demand is made that the Commission be enjoined

> "(6) From bringing and/or prosecuting *any suit, action or proceeding* to enforce any penalties or

> forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, *or the said Contracts Nos. 1, 2 and 3 and related certificates, against the plaintiff; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff* with the provisions of the said acts, orders, tariff schedules, *contracts or certificates or any of them in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger*, or prohibit the plaintiff from charging a rate of fare of seven cents per passenger, upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division."

which would, of course, enjoin the Commission *from prosecuting any suit to enforce Contract 3 or the Certificate.*

Subdivision (1) of the Prayer for Judgment (Record, page 96), demands that the Commission be enjoined from exercising its *regulatory* powers. In other words, that the Commission be restrained from taking any legislative action calculated to prevent the plaintiff's schedules filed on February 1, 1928, from becoming operative (Record, page 96):

> "(1) From *in any way enforcing, or attempting to enforce*, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division, *of not more than five cents per passenger*, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise."

This, as well as other prayers for relief, demands that the Commission be enjoined from denying an increase under the *regulatory* powers vested in the Commission by the Public Service Commission Law.

By the Supplemental Complaint (filed *after* the Commission in its regulatory capacity had refused an increased fare and *after* the Commission and the City in their contractual capacity had instituted suits to enforce the *Contracts*) the prayer for relief is extended to the Order made by the Commission on February 14th in its *regulatory* capacity and the suits instituted by the Commission and

the City in their *contractual* capacity, as follows (Record, page 138):

> "2. That it be adjudged and decreed that the plaintiff have similar relief in respect to the *orders, acts and determinations of the defendants constituting the Transit Commission*, and the *suits and proceedings brought* or threatened to be *brought by the defendants, or either of them*, which are set forth in this amended and supplemental complaint, as in respect to the orders, acts, determinations, actions or proceedings which are set forth in the original complaint."

The Relief Granted by the Order Appealed From.

The interlocutory injunction enjoins action by the Commission, *both* in its regulatory and in its contractual capacity.

In its *contractual* capacity the Commission and the City are enjoined as follows (Record, page 2001):

> "(3) *From bringing and or prosecuting any suit, action or proceeding* to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, Chapter 743 of the Laws of 1894, or any other law, the said orders or directions, *the said Contracts Nos. 1, 2 and 3, or the said elevated railroad certificates, against the plaintiff or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said* acts, orders, tariff schedules, *contracts or certificates, or any of them*, in so far as they, or any of them, impose a maximum rate of fare of five (5) cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven (7) cents per passenger, or any rate in excess of five (5) cents per passenger, upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division."

In its *regulatory* capacity the Commission is enjoined as follows (Record, page 2000):

> "(1) From *in any way enforcing*, or attempting to enforce, against the plaintiff, *a rate of fare of*

> *five* (5) *cents per passenger* for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division thereof."

And also (Record, page 2001):

> "(4) From doing *any act or thing interfering with the right* or authority of the plaintiff *forthwith to charge or receive for the transportation of passengers* by it, upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, *a rate of fare of seven* (7) *cents per passenger.*"

That this was the intention of the District Court clearly appears, moreover, from the recitals contained in the interlocutory injunction (Record, pages 1999-2000) in which

> "Contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902, and July 19, 1913, and their modifications and/or of the Certificates for elevated extensions and third-tracking, dated March 19, 1913"

are expressly referred to.

It is manifest, therefore, that this suit was intended to accomplish *two* purposes:

(1) To restrain the Commission and the City, as the contracting parties to Contract 3 and the Certificate, *from enforcing those contracts by judicial proceedings in the Courts of New York State* on the theory that these Contracts are unenforceable and,

(2) To restrain the Commission *from exercising the regulatory or legislative powers* delegated to it by the Public Service Commission Law, by acting *unfavorably* upon the amendatory schedules filed by the Interborough Company on February 1st, on the theory that the Commission *might* exercise its legislative powers in such a way as to prevent those schedules from taking effect.

Specification of Errors.

1. The Court erred in taking jurisdiction of this case.

2. The Court erred in not holding that the Bill of Complaint does not state facts sufficient to constitute a cause of action, and in not refusing the injunction, and in not dismissing the suit and Bill of Complait.

3. The Court erred in granting a preliminary injunction decreeing that the defendants be enjoined and restrained pending the determination of this cause from in any way enforcing or attempting to enforce against the plaintiff a rate of fare of five (5) cents upon the Rapid Transit Railroad Lines operated by it, or the Manhattan Division, or Subway Division thereof; and from in any way enforcing or attempting to enforce against the plaintiff the provisions of Contracts and Certificates to prevent the plaintiff from charging a fare in excess of five (5) cents thereon, and from bringing or prosecuting any suit, action or processing to enforce the said contracts, No. 1, No. 2 and No. 3, and the said Elevated Railroad Certificates, against the plaintiff, or otherwise to compel compliance by the plaintiff with the provisions thereof, for a five (5) cent fare, or to prohibit the plaintiff from charging a fare of seven (7) cents upon the said Rapid Transit Railroads, or any part thereof; and from doing any act, or in interfering with the plaintiff forthwith charging or receiving upon said Rapid Transit Railroads, or any part thereof, a fare of seven (7) cents per passenger.

4. The Court erred in holding that the plaintiff was not bound by the provisions of Contracts No. 1, No. 2 and No. 3, and each of them, that during the term of such contracts and each of them, the plaintiff be entitled to charge for a single fare upon the Rapid Transit Railroads, constituting what is called the plaintiff's Subway Division, the sum of five (5) cents, but not more.

5. The Court erred in holding that the plaintiff was not bound by the provisions of the Elevated Railroad Certificates, and each of them, dated March 19, 1913, that it should be entitled to charge for a single fare the sum of

five (5) cents, but not more, over the railroads mentioned, referred to or described therein, including parts of the municipal railroad over which the plaintiff was provided with trackage rights, and additional tracks, and the Manhattan Railroad.

6. The Court erred in not holding that Contract No. 3, the Elevated Railroad Certificates, and other agreements and instruments, authorized, executed and delivered on, or pursuant to action taken on March 19, 1913, or thereabouts, were not parts of a single transaction whereby the plaintiff was obligated to receive and charge a fare of five (5) cents, but not more, on all of the several lines constituting that the plaintiff denominates as its Subway Division, and Manhattan Division.

7. The Court erred in holding that Contract No. 3 in its terms superseded the provisions of Contracts No. 1 and No. 2 as to the rate of fare.

8. The Court erred in holding that the Elevated Extension Certificate was not granted under authority of the Rapid Transit Act, as amended in 1912.

9. The Court erred in holding that the five (5) cent fare limitation was established by Chapter 743 of the Laws of 1894, unless the Extension Certificate of March 19, 1913, or Resolution of the Board of Estimate and Apportionment formally approving the proposed Certificate and consenting to the construction and operation of the extensions, in accordance therewith, were a constitutional consent to a different fare.

10. The Court erred in holding that the five (5) cent fare limitation as to the Elevated Railway Company is statutory under Chapter 743 of the Laws of 1894 and that the action of the Board of Estimate and Apportionment in relation to the Elevated Railroad Certificates was ineffective to create any contractual fare limitation.

12. The Court erred in holding that Contract No. 3 was a waiver of the fare provisions in Contracts No. 1 and No. 2.

13. The Court erred in holding that when Contract No. 3 was made, the fare provisions thereof were subject to regulatory revision in the manner prescribed by the Public Service Commission Law.

14. The Court erred in holding that Contract No. 3 must be regarded as qualified by the restrictions of the Public Service Commission Law.

15. The Court erred in holding that the Contracts No. 1, No. 2 and No. 3 furnish, and neither of them furnishes, no obstacle to the exercise of jurisdiction by the Public Service Commission to regulate the rates of fare therein provided.

16. The Court erred in holding that there was nothing in the amendment of the Rapid Transit Act in 1912 which excludes the plaintiff from the application of the regulatory plan, and that that Act contains no clear and unmistakable evidence of effort to delegate to the City authority to establish by contract in 1913 unchangeable rates to be charged by the plaintiff.

17. The Court erred in holding that there was no delegation in any part of the Act of the regulatory power of the State Legislature.

18. The Court erred in holding that the State courts have announced that there must be read into the contracts made after 1907 the authoritative regulation provided for by the Public Service Commissions Law.

19. The Court erred in holding that by express terms, and by construction of the Court of Appeals of the State of New York, legislation resulting in the Public Service Commissions Law established a policy prohibitive of permanent rates of fare, and that by the Public Service Commissions Law the contractual capacity for a continuing fixed fare was limited.

20. The Court erred in holding that the Rapid Transit Act as amended in 1912 did not grant unqualified authority to contract for a fixed rate of fare for the entire life of the contract, and that the contractual authority was

confined by the Public Service Commissions Law to the establishment of temporary rates, not foreclosing either party against change.

21. The Court erred in holding that the provision of the lease in Contract No. 3, "the lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroads and Existing Railroads the sum of five (5) cents but not more" was subject to the regulatory law and power of the Public Service Commission.

22. The Court erred in holding the total value of the property used in the system operated by the plaintiff to be $898,793,648.

23. The Court erred in holding that the operation by the plaintiff shows an actual earned return of only 2.65% in 1926 and 2.52% in 1927.

24. The Court erred in holding that the plaintiff was entitled to a return upon a valuation of $898,793,648.

25. The Court erred in holding that the plaintiff was entitled to a return of 8% upon the foregoing valuation, or any other valuation.

26. The Court erred in holding that the plaintiff was entitled to any return upon the subways owned by the City of New York and denominated by the plaintiff as its Subway Division, on any other basis than that provided in Contracts No. 1, No. 2 and No. 3, and each of them.

27. The Court erred in holding that the plaintiff was entitled to any greater return upon the lines embraced in what it denominates as its Manhattan Division, than is provided in the Elevated Railroad Certificates.

28. The Court erred in holding that the value of property owned by the City of New York could be taken as a basis of a return on operations by the plaintiff.

29. The Court erred in holding that the present value of property provided by the plaintiff, exclusive of City property, shows a return of 3.61% actually earned in 1927.

30. The Court erred in holding that the present value of the Company owned and Company provided property amounts to $554,413,648.

31. The Court erred in holding that the return guaranteed by the Constitution is upon all of the property devoted to the public use, including that of the City of New York.

32. The Court erred in holding that the return to which the plaintiff is entitled depends upon the present value of the property used.

33. The Court erred in holding that the denial by the Transit Commission of a change of rate of fare was a denial of due process of law.

34. The Court erred in holding that under the present rate of fare there would be a continuous confiscation amounting to taking property without due process of law.

35. The Court erred in holding that the plaintiff had established its claim of confiscation of its property and that it was entitled to the injunctive relief it seeks.

36. The Court erred in permitting the plaintiff to charge a seven (7) cent fare on the Rapid Transit Railroads operated by it, or any of them.

37. The Court erred in holding that upon the filing of a bond for $5,000,000, or for any other sum, the plaintiff might receive and withhold fares in excess of five (5) cents paid by the passengers riding upon its lines, or any of them.

40. The Court erred in holding that there was a federal question in this case.

41. The Court erred in holding that the action of the defendants constituting the Transit Commission in refusing to alter the provisions as to rate of fare in Contracts No. 1, No. 2 and No. 3 and the Elevated Extension Certificate were subject to judicial review.

PART I.

JURISDICTION OF THE FEDERAL COURT.

In the discussion under this Part of our brief, *and for that purpose only*, we will assume throughout that the Transit Commission had not only the power *but that it was its statutory duty* to increase the rate of fare stipulated in the Contracts. In other words, we will assume, as the District Court has held, that the Contracts are not only subject to revision by the Commission *but that it is the duty* of the Commission to exercise that power here. The District Court said (Record, page 1990):

> "We therefore hold that the provisions of the lease in contract No. 3 'the lessee shall during the term of the contract be entitled to charge for a single fare upon the railroads and existing railroads the sum of five cents, but not more,' *was subject to the regulatory law and power of the Public Service Commission* as effectively as though written in the contract, which means that, when this fare of five cents *became* unjust and unreasonable, it *was subject to the commission's regulation.*"

Again it said (Record, page 1984):

> "The law created *the duty* of the Public Service Commission to administer and enforce the new State policy."

Indulging all these assumptions, we inquire what right under the Constitution had been impaired; (1) *At the time* of the institution of this suit (Division I of this Part of our brief) and; (2) *Thereafter* by the refusal of the Commission to exercise a *duty imposed by the statutes of the State of New York*, which, if exercised, would result in releasing the plaintiff from its Contract obligations (Divisions II, III and IV of this Part of our brief).

I.

The Plaintiff had no Cause of Action Cognizable by a Federal Court at the time it Instituted this Suit either (1) to Restrain the Commission in its Contractual capacity from Instituting Judicial Proceedings to Enforce the Contracts or (2) to Restrain the Commission in its Regulatory capacity from Exercising its Powers under the Public Service Commission Law. That Defect could not be Cured by Allegations, by Supplemental Bill, of Facts that Occurred Thereafter.

We have shown (*ante* pages 14-16, 18-20) that when the plaintiff filed its amendatory schedules the Commission might proceed in either or in both of its capacities;

(a) As the *contractual party* to the Contracts that were threatened with violation the Commission might institute judicial proceedings to enforce the Contracts.

(b) As the *regulatory body* it might exercise its legislative powers under the Public Service Commission Law by refusing the plaintiff's application for the increase contained in its amendatory schedules.

We now propose to show that the Federal Court had no jurisdiction upon such a state of facts *on either theory* at the time of the institution of this suit.

(a)

The Federal Court had no Jurisdiction to Enjoin the Commission, as a Contractual Party, from Instituting Judicial Proceedings to Enforce the Contracts in the State Courts, Even Assuming the Contracts to be Unenforceable.

Let it be assumed for the moment that the Contracts here are unenforceable but that nevertheless the Commission at the time of the institution of this suit, as a party to those Contracts charged by the Statute with the duty

of enforcing them, intended and had "threatened" (as alleged in the Complaint) to institute *judicial proceedings* in the State Courts to require performance by the Interborough of its *unenforceable* contractual obligations.

The District Court apparently granted the injunction principally upon this theory. It said (Record, page 1971):

> "The defendants *actively sought the aid of the State Court* in enjoining the plaintiff from processing to enforce its rates."

And again (Record, page 1993):

> "*The Commission did more than to refuse to act.* On February 14th rejecting the proposed new rates *it instituted proceedings* to forbid their operation. A forced continuance of confiscatory rates *amounts to a denial of due process of law.*"

This, also, it will be found is the theory upon which the complaint proceeds. The plaintiff alleges that under the Statutes of New York State the Contracts in question are "subject to the regulatory law" (Record, page 51) and that in consequence the plaintiff is not limited to a five-cent rate. The plaintiff, accordingly, contends throughout the complaint, and, as we have shown, the District Court has sustained the contention, that the intention of the Commission and the City to enforce the Contracts *by judicial proceedings* in the New York Courts is a violation of the plaintiff's Constitutional rights. Thus, Paragraph LXIV of the complaint (Record, page 87), alleges:

> "Announcement has been made *that legal proceedings to compel the continuance of the said confiscatory rate* (i. e., the five-cent fare) *and to obstruct and prevent what the plaintiff believes to be its duly filed and lawfully established rate are contemplated by the City of New York.* * * * The decision and intention of the defendant members of the Transit Commission *to bring various actions, suits and proceedings against the plaintiff, to direct and compel continuance of the confiscatory rate of five cents, has been repeatedly announced* and stated in the public press, and never denied by any of the defendants. * * *"

The same allegations recur throughout the Complaint (Record, pages 33, 35, 78).

The theory that constitutional rights are infringed when a party, whether private or municipal, threatens to institute *judicial proceedings to enforce* what are believed to be contractual rights is both amazing and alarming. If upheld, it would, as this Court observed in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 149:

> "amount only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this Court."

That case arose out of a controversy between the parties concerning the interpretation of a provision of the Charter granted to the Gas Light Company by the City of St. Paul. The City had agreed to pay interest on the cost of street posts and gas lamps installed by the Company. Thereafter the City ordered the Company to demolish certain posts, and the question arose whether the City was obligated to pay interest on the cost of posts after they had been taken down. The City passed an ordinance directing that no interest be paid. The Gas Light Company contended that this involved a denial of a constitutional right. This Court said:

> "This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of its provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every

> case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In *Des Moines* v. *Des Moines Railway Co.*, 214 U. S. 179, a situation very similar to the one at bar was before this Court. The Des Moines City Railway Co. contended that it had received a perpetual franchise from the City to operate its lines over the streets of Des Moines. The City denied this construction of the franchise and the City Council passed Resolutions ordering the Railway Company to remove all its tracks from the streets. It was further resolved that if the Railway Company should fail to do so,

> "The City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above Resolution."

This Court held that the Federal Court in Iowa had no jurisdiction to grant an injunction against the enforcement of the Resolution. It said:

> "We are of the opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply *a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views.* The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court."

Speaking of the Des Moines case this Court said in *South Covington Railway Co.* v. *Newport*, 259 U. S. 97, 100:

> "There the bill disclosed that the only affirmative action contemplated by the City was the institu-

> tion of an orderly proceeding in court. Such action could not in any proper sense violate a right under the Constitution, laws or treaties of the United States. The bill did not, therefore, present a substantial federal question, and for that reason jurisdiction did not exist."

The same question was again presented in *Western Union Telegraph Co.* v. *Georgia*, 269 U. S. 67. There a Statute of the State of Georgia authorized the Commission to institute legal proceedings to assert the State's title to a right of way of the Western and Atlantic Railroad. The Commission instituted proceedings in the Courts of Georgia to eject the Western Union Company from the right of way and was successful. This Court held that no Federal question was involved, saying:

> "Mere authority to test disputed rights by a suit does not impair the obligation of a contract upon which a defendant relies. *When a claim is set up under a contract the Constitution does not forbid litigation to decide whether one was made or what it means.*"

In *City of Cincinnati* v. *Cincinnati and Hamilton Traction Company*, 245 U. S. 446 (1918), a dispute arose between the City and the utility over the franchise rights of the latter to operate a Street Railway system in the City of Cincinnati. Finally the City passed an Ordinance specifying the terms under which the Company might continue to operate in the City and directing the City Solicitor to take legal proceedings to enforce it. At the argument of the case before this Court, counsel for the City of Cincinnati assured the Court that the City intended to enforce the Ordinance by legal proceedings, and by legal proceedings only. The District Court had decided the case on the merits and had entered a final decree unqualifiedly enjoining the City from enforcing the Ordinance in question. This Court declined to consider the merits and modified the injunction of the District Court so as to restrain the City.

> "From taking any steps to enforce the Ordinance (except institution of necessary court proceedings) prior to final adjudication of controversies involved."

The same rule has been applied in other cases in the lower Federal Courts.

In the *City of St. Augustine* v. *St. Johns Electric Co.*, 286 Fed. 474 (C. C. A. 5th, 1923), the court refused to enjoin the City of St. Augustine from instituting legal proceedings to enforce what it believed to be its contractual rights against the St. Johns Electric Co. The City had passed a Resolution requiring the Company to make certain paving repairs required, it was contended, by the Company's franchise contract with the City. The Statutes of Florida provided that the failure of a utility to comply with the reasonable provisions of any City Ordinance should warrant a forfeiture of its Charter upon appropriate judicial proceedings. The Company filed a bill in the Federal Court to enjoin the taking of any steps to enforce the Ordinance or to declare a forfeiture of the charter. This relief was granted by the District Court, but the judgment was reversed by the Circuit Court of Appeals. The Court said:

> "If it be conceded that the City has no sufficient ground on which to secure a judgment for forfeiture, a Resolution *to institute judicial proceedings to test that question would not raise any question under the Fourteenth Amendment of the Constitution of the United States.* The Electric Company can fully assert its right in the judicial proceedings *proposed to be instituted* in the Circuit Court . . . The judgment of the District Court is reversed and the cause remanded, with directions that said bill be dismissed *for want of jurisdiction.*"

In *American Telephone & Tel. Co.* v. *Town of New Decatur*, 176 Fed. 133 (N. D. Ala. 1910) a controversy arose between the town of New Decatur and a utility concerning the terms of its franchise contract. The Town contended that the utility had violated the contract and that its franchise was accordingly forfeited. The Town Council passed a Resolution directing the utility to remove its poles and wires from the streets within 30 days and if it failed to do so the enforcement officers were directed to remove them. Subsequently, however, Resolutions were enacted by the Town Council directing its

attorney to commence proceedings in the State Court to require the removal of the poles and wires. The Court held that Federal jurisdiction did not exist and said:

> "This resolution, passed subsequently, clearly indicates the abandonment by defendant of any intention on its part to remove the poles and wires by violence, *and an intention to compel their removal by legal proceedings only* . . . Construing the Resolutions and Ordinances as an entirety the only action reasonably to be expected to be taken by the town authorities *was a suit in court*. This case is therefore, identical with the case of Des Moines City Railway Co. supra and controlled by it. For the reasons stated the court *is without jurisdiction*."

The rule therefore is indisputable that the enforcement of *contractual rights by litigation* will not be restrained by the Courts of the United States, nor will the Courts of the United States inquire as to whether or not the claim of right is sound, or incorrectly founded. Property taken by orderly *judicial* proceedings, however erroneous the decision may be, is not taken "without due process of law" (*Ross* v. *Oregon*, 227 U. S. 150), and there is no more reason to exercise jurisdiction in cases to which a State contract-making body is a party than there is to review the decision of a State Court in any ordinary contract case. If Federal jurisdiction exists in such a case it must exist in every case where a plaintiff has threatened to enforce a note that is claimed to be forged, or a contract said to have been made without consideration. And if this be true, there is no limit to the Federal jurisdiction.*

The State suits, eventually brought, were not instituted to enforce Section 743 of the Laws of 1894, which is not

---

* Note—The same principles are applicable to the letter of February 10, 1908, from the Commission's Special Counsel to the Interborough upon which the Fifth Cause of Action proceeds (Record, page 89). The "protest and denial" of the Commission against the appropriation of the City's interest in the funds in the hands of the Interborough as the result of joint operation, in violation of the City's *contract*, coupled with the threat "to take steps to secure the enforcement of its rights in this direction," was merely the assertion that unless its *contractual rights* were respected they would be enforced by *judicial* proceedings.

even mentioned in any of those suits. All the suits *allege and rely exclusively upon the provisions of the Contracts as the basis for relief.* In fact, the Opinion of the Commission of February 14, 1928, refusing the plaintiff's application for an increased fare, makes it clear that Section 743 of the Laws of 1894 was never considered (because it is not referred to) until the existence of that Statute was attempted to be made the basis of Federal jurisdiction by the plaintiff here.

In fact, *it is not alleged* in the First Cause of Action of the Complaint that the Commission or the City intended to insist upon the five cent fare *on account of the provisions of Section 743 of the Laws of* 1894 but on the contrary each of the remaining four Causes of Action *allege* that the Commission and the City intended to enforce the five-cent fare *under the Contracts,* by judicial proceedings in the State Courts.

(b)

The Plaintiff Could Not at the Time it Instituted this Suit Enjoin the Commission in its Regulatory Capacity from Taking Action under the Public Service Commission Law with Respect to its Amendatory Schedules, on the Theory that the Action of the Commission, if Taken, would be Unconstitutional.

The *regulatory* powers of the Commission here with respect to rates are indisputably legislative since it acts under the rate-making authority of the Legislature.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210.

Under the decision in the *Prentis case* the same rules are applicable to legislative action *by the Commission* as to legislative action *by the Legislature itself.* If action by the Commission may be enjoined *before it is taken,* then upon identical principles action by the Legislature may be enjoined before it is taken on the theory that the Legislature intends to enact an unconstitutional statute.

It is highly important to understand the situation of the Interborough on the morning of February 14, 1928.

The Interborough had filed its amendatory schedules fourteen days before and, in the absence of any contract and of action by the Commission on the schedules under Section 29, the schedules thus filed would become effective on March 3, 1928, both with respect to the Elevated and Subway Lines. It is expressly so alleged in the complaint (Complaint, paragraph XXXIII-a, Record, pages 39-40) as follows:

> "As a common carrier subject to the provisions of the Public Service Commission Law of the State of New York, the plaintiff therefore by action duly taken by its directors and officers, in pursuance of the authority and powers conferred by law *fixed, determined and established a fare of seven cents per passenger as the rate hereafter to be charged and collected, instead of a fare of five cents from each passenger, upon each the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the Company*, and accordingly filed, published and posted tariff sheets * * * establishing such fare of seven cents per passenger, *issued February* 1, 1928, *and effective March* 3, 1928."

The purpose and effect, therefore, of an injunction restraining the Commission from exercising its *regulatory* functions was to restrain the Commission from taking *unfavorable* action with respect to the schedules thus filed and which, *if taken*, would prevent the schedules from becoming effective on March 3, 1928. In other words, the effect of such an injunction would be to restrain the Commission from exercising *its legislative powers* under the Public Service Commission Law with respect to the schedules filed by the Interborough Company on February 1, 1928.

It has been uniformly held that a Federal Court may not enjoin the enactment of legislation or the exercise of powers of a legislative character on the theory that, if thus exercised, they would be unconstitutional. No matter how imminent such legislation may be a party must await *final action* by the legislative body before proceeding to enjoin its enforcement. In the entire history of

this Court we have found no case in which it has sustained a decree enjoining action of a legislative character *before it had been taken.* Such a suit would, moreover, constitute a suit against the State.

Fitts v. *McGhee*, 172 U. S. 516.

To restrain a legislative body from pursuing, with respect to pending legislation, one out of two possible courses of action, *is in effect to legislate.* It limits the legislative body *to the course of action not enjoined.* The result would be that whenever there was pending a Statute, Ordinance or Order the constitutionality of which was questionable, Injunction Proceedings, with Interlocutory Injunctions and Temporary Restraining Orders would be secured to restrain the Legislature from enacting, or it might be from repealing, the Statute thus sought to be enjoined. Every State Legislature, or Congress, would be at the mercy of anyone undertaking to interfere in the public business no matter how urgent might be the need for immediate legislative relief.

The principle involved is not affected by the circumstance that the party anticipating injury from pending legislation knows, or thinks he knows, that the unconstitutional Statute or Order will be enacted by the Legislature or by its delegate. As this Court observed in the *Prentis case, supra:*

> "It seems to us only a just recognition of the solicitude with which their rights have been guarded *that they* (the Railroads) *should make sure that the State in its final legislative action would not respect what they think their rights to be before resorting to the Courts of the United States.*"

In conclusion the Court said:

> "It would be premature and is unnecessary to decide whether the State has done so or not."

Accordingly, until *a Statute has been enacted or an Order made,* no injury to anyone is possible and thereafter any person is in a position, in a proper case, to protect himself from injury by an injunction against its *execution.*

In *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 41, the general rule was stated and applied by Mr. Justice Harlan, who, in delivering the opinion of the Court, said:

> "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff and is unconstitutional and void as impairing the obligation of the contract with the state, it will be time enough for equity to interfere and by injunction to prevent the execution of such ordinance."

The Court also said at page 481:

> "If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, *our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.* It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the State and are to be respected by all. *But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption.* The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. (*Chicago* v. *Evans*, 24 Illinois, 52, 57; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa 505; 1 Dillon on Mun. Corp., Sec. 308, and notes; 2 High on Injunctions, Sec. 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts *may then be invoked* for the protection of private rights that may be violated by its enforcement. *Page's case*, 34 Maryland, 558, 564; *Baltimore* v. *Radecke*, 49 Maryland, 217, 231.)"

This Court accordingly affirmed the decree of the Court below which had dismissed the Bill *for want of jurisdiction*.

In *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S., 483, this Court again reaffirmed this principle. There the Railroad Commission of Kentucky had been enjoined from fixing rates under a statute which it was claimed was unconstitutional. The general rule was stated by Chief Justice Fuller thus:

> "The fixing of rates is essentially legislative in its character and the general rule is that legislative action cannot be interfered with by injunction."

After careful consideration of the earlier authorities the Court concludes as follows:

> "The result of these considerations is that the duty of enforcing its rights rests on the commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition *before the rates are fixed at all*. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record and we are not called on to dispose of other contentions of grave importance which were pressed in argument *as if now requiring adjudication*."

This Court accordingly reversed the decree of the Court below, which had granted an injunction, and ordered the Bill to be dismissed *for want of jurisdiction*.

In *Southern Pacific Co.* v. *Bartine*, 170 Fed. 725, the principle is stated thus at page 775:

> "No legal principle is better established than the rule that the power to fix rates, if delegated by the Legislature to a Railroad Commission, is, in kind, a legislative function, and that courts of equity will not interfere in advance by injunction to control the exercise of such a power. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 68, 53 L. Ed. 150; *McChord* v. *Louisville & N. R. Co.* v. *Brown* (C. C.), 123 Fed. 946, 948; *Chicago, B. & Q. R. Co.* v. *Winnett* (C. C. A.), 162 Fed. 242,

246; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 482, 17 Sup. Ct. 161, 41, L. Ed. 518.

> The fixing of rates is a legislative rather than a judicial act. This is true even though the order fixing a rate was preceded by the most searching investigation, whether conducted under judicial forms or not. It is the essential nature of an act rather than the method of its accomplishment which determines its character."

Similarly in *Chicago, B. & Q. R. Co.* v. *Winnett*, 162 Fed. 242, the Circuit Court of Appeals for the Eighth Circuit said at pages 246-247:

> "That the general power to fix rates for the transportation of passengers and freight by common carriers between points within a state belongs to the Legislature of each state, that said power may be exercised by the Legislature itself or be delegated by it to a commission established for that purpose, and that courts of equity will not interfere by injunction to control the exercise of this power in advance, are propositions established beyond question by the following authorities:" (citing many authorities).

In *Alpers* v. *City and County of San Francisco*, 32 Fed. 503, the Bill alleged that the Board of Supervisors of the City of San Francisco proposed to pass an Ordinance which, if enforced, would impair the obligation of the plaintiff's contract with the Board, and to deprive him of his property without due process of law. A motion to enjoin the Board from enacting the proposed Ordinance was made and denied. The Court (by Mr. Justice Field) said:

> "The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a Court of Equity. This no one will question as applied to the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The

> same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. * * * If by either body, the legislature or the Board of Supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. *It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.*"

Other cases to the same effect are:

> *Rico* v. *Snyder*, 134 Fed. 953;
> *Missouri Ry. Co.* v. *Olathe*, 156 Fed. 624;
> *Gas & Electric Co.* v. *Manhattan & Queens Corp.*, 266 Fed. 625;
> *Stevens* v. *St. Mary's Training School*, 144 Ill. 332.

In the case at bar there was no action of a legislative character at the time of the institution of this suit *for the reason that the Commission was not afforded an opportunity to act.* So impatient was the plaintiff to deprive the State Courts of the opportunity to construe their own statutes and decisions that without awaiting any Order of the Commission with respect to the amendatory schedules *filed fourteen days before*, it instituted this suit in the Federal Court. If the plaintiff could file amendatory schedules and then proceed in the Federal Court *before* any Order with respect thereto had been made, *there is no reason why it could not proceed in the Federal Court without filing any amendatory schedules whatever for an increased fare.*

It is furthermore obvious that at the time of the institution of this suit no review of the Order of the Commis-

sion would have been possible, even by *direct review by Certiorari* even in the *State* Court, for no Order had been made. And yet, it is contended that the action not yet taken by the Commission may be reviewed by *collateral* proceedings in the *Federal* Court.

This question, again, is not affected by the existence of Chapter 743 of the Laws of 1894 since *in the absence of contract* the Commission was plainly given jurisdiction by Section 49 to revise a rate of fare

> "notwithstanding that a higher rate of fare or charge has been *heretofore* authorized *by general or special statute.*"

which under the construction accorded to this provision in *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244, would have authorized the Commission, in the absence of contract, to *increase*, as well as to reduce, the rate stipulated in any "*general or special statute*" including Chapter 743 of the Laws of 1894.*

It follows that except for the Contracts the Interborough, by filing its amendatory schedules on February 1st could, notwithstanding the existence of Chapter 743 of the Laws of 1894, have made the increased fare effective on March 3d, *unless the Commission should take action with respect thereto* and that any injunction restraining the Commission from granting *or refusing* this relief constitutes such an impairment of legislative functions as this Court has never sanctioned before.†

---

* Note—The Statute with respect to *railroad* corporations in this respect is the reverse of the Statute that was before this Court in the *Consolidated Gas Company cases* (*Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Ottinger* v. *Consolidated Gas Co.*, 272 U. S. 576). There the Commission by Section 72 of the Public Service Commission Law, relating to Gas Companies, was authorized to regulate the rate "*but not exceeding that fixed by statute.*" Accordingly, it was held (*People ex rel. Municipal Gas Co.* v. *Public Service Commission*, 224 N. Y. 136, 165-166) that the Commission *had no authority to increase a statutory rate* even though the rate was shown to be confiscatory.

† Note—With respect to the Appellee's contention that the facts *alleged* in the First Cause of Action of the Complaint, entitle the plaintiff to maintain this suit in the Federal Courts irrespective of whether or not the four other Causes of Action, directed against the Contracts, are within the Federal jurisdiction, it is sufficient to say that even if the plaintiff had

Moreover, since the Plaintiff Is Not Entitled to Any Relief Except under the Public Service Commission Law It May Secure Relief Only as Provided Thereby and Not by Litigation in the Federal Courts.

The District Court concedes (Record, pages 1979, 1987) that *except for the enactment of the Public Service Commission Law* the plaintiff would not, under any circumstances, be entitled to maintain this suit. Since, therefore, the plaintiff would have no rights except for the existence of that Law, *it follows that the plaintiff must submit to the conditions and follow the procedure established thereby.* The *Statute* here is the Charter of the plaintiff's rights and it marks also their limitations.

The plaintiff could not, therefore, as it has done here, file its amendatory schedules on February 1, 1928, *under the Statute and then interrupt the statutory proceedings by instituting suit in the Federal Court to procure relief which, under the Statute, only the Commission was authorized to grant.* The plaintiff could not avail itself of the *privilege* which the Statute offered (assuming that it does so) to secure release from its contracts by filing amendatory schedules *and then repudiate* those provisions of the Statute authorizing an increase in the rate, only in the manner and upon the conditions which the Statute specifies.

The language of this Court in *Henderson Water Company* v. *Corporation Commission*, 269 U. S. 279—a case which we will soon consider more extensively—is so peculiarly applicable that we venture to anticipate one sentence here (page 282):

> "*Only* by securing *the waiver of the franchise rates by order of the Corporation Commission* speaking for the State, did the Water Company *have any standing* to ask for a fixing of rates *in excess of the franchise rates.*"

---

stated a Cause of Action directed against Chapter 743 of the Laws of 1894, that would not entitle it to join *other* causes of action relating *to the Contracts* not otherwise cognizable in the Federal Courts. In *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, this Court said: "It hardly needs statement that the jurisdiction, as limited and fixed by Congress, cannot be enlarged or extended by uniting in a single suit causes of action, of which the Court is without jurisdiction, with one of which it has jurisdiction."

In *Galveston H. & S. A. Railway Co.* v. *Wallace*, 233 U. S. 481, this Court said:

> "Where the statute creating the right, provides an exclusive remedy, to be enforced in a particular way, *or before a special tribunal*, the aggrieved party will be left to the remedy given by the statute which created the right."

In *Pollard* v. *Bailey*, 20 Wall. 520, a statute of Alabama incorporating a bank provided that the stockholders should be responsible for the debts of the bank and that they might be so charged by a Bill in Equity. A creditor instituted suit at law against the stockholders in the United States Circuit Court. This Court said:

> "The liability and the remedy were created by the same statute. *This being so, the remedy provided is exclusive of all others.* A general liability created by statute, without a remedy, may be enforced by an appropriate common law action. But where the provision for the liability is coupled with *a provision for a special remedy, that remedy, and that alone*, must be employed."

Similarly in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29, it was said:

> "Where a statute creates a new offence and denounces the penalty, *or gives a new right and declares the remedy*, the punishment or the remedy can be only that which the statute prescribes."

In *United States* v. *Babcock*, 250 U. S. 328, it appeared that Babcock's horse had died as the result of poisoned grain furnished by the Army Supply Department while Babcock was an officer in the Army. By Act of March 3, 1885, it was provided that the accounting officers of the Treasury should investigate and determine the propriety of paying losses thus sustained and that losses so determined should be paid. The representatives of the Treasury declined to recognize the loss and it was held that the Court of Claims had no jurisdiction to re-consider the action of the Treasury or to grant other relief. The Court said:

> "Where a statute creates a right and provides a special remedy, that remedy *is exclusive*."

The fallacy underlying the conclusion of the District Court is apparent from the following quotation from its opinion (Record 1982):

> "If the parties have not thus agreed (in such a way as to suspend the regulatory powers of the State) to a five-cent fare, when that fare becomes unreasonable because it is non-compensatory or because it is excessive, the contract furnishes no obstacle to the exercise of jurisdiction by the Public Service Commission *and when it fails to act* there is jurisdiction in the Federal Courts to protect the corporation against confiscation." (Matter in parenthesis ours.)

This conclusion, so vital here, will be found to rest upon the false assumption that because the Contract is subject to the power and the duty of the Commission to regulate the rate and because the Commission, acting for the State, *has refused to exercise that power thereby leaving the Contract in effect*, a Federal Court may intervene *and take the action which the Commission has refused to take.*

Here the Statute not only created a remedy unknown to the common law but set up a Special Tribunal (the Commission) by which that remedy should be applied. That Tribunal was authorized to "determine" the rate and "to fix the same *by Order.*" The Legislature not only did this, but it proceeded further and by Section 26 provided that no common carrier might charge more than allowed

> "*by Order of the Commission* having jurisdiction and made as authorized by this Chapter."

That there might be no possible doubt on this subject, the Legislature repeated that *prohibition* at the conclusion of Section 26 by expressly providing that any charge in excess of that allowed

> "by Order of the Commission *is prohibited.*"

The Statute here, which created the *statutory right*, also created the *remedy*, and it not only created the remedy but it created the *Special Tribunal* by which it should be applied. That remedy is *not* a suit in equity and that Tribunal is *not* the District Court.

Since the Plaintiff had no Cause of Action at the Time it filed its Original Bill that Defect cannot be Cured by Allegations, by Supplemental Bill, of Facts that Occurred Thereafter.

The question thus presented *is not merely procedural.* It lies at the very foundation of the plaintiff's case and raises an issue on the decision of which depends the plaintiff's right to maintain this suit in the Federal Courts *to the exclusion of the State Courts* solely by reason of alleged priority in the filing of its Bill. By reason of that priority, and *for that reason alone* (Supplemental Record, pages 121-123), it has succeeded by ancillary proceedings in enjoining the prosecution of the State Court suits. If the plaintiff may thus receive the benefit arising from the institution of this suit in priority to the institution of the State suits, it must also suffer whatever detriment arises from the circumstance that its suit was instituted *before* the plaintiff had a cause of action cognizable in a Federal Court.

We insist that the plaintiff could not anticipate the State Court suits by this Federal suit and then by supplemental Bill cure the fundamental infirmity in the Federal suit *by allegations of facts that occurred thereafter.* And this was done by the plaintiff because it was essential for the plaintiff's purpose that the *original* suit should be reconstructed by Supplemental Bill to state a cause of action that did not exist when the suit was brought, *because no new suit instituted after the State Court suits would answer its purpose.*

If the plaintiff can succeed in this ingenious artifice it will result in vesting jurisdiction in the Federal Courts *to the exclusion* of the State Courts, although at the time of the institution of the Federal suit the plaintiff had no cause of action on which to proceed. Fortunately, however, the rule of law is well settled that a Supplemental Bill is insufficient to supply allegations of facts necessary to state a cause of action *that did not occur* until after the filing of the Original Bill.

In *Chicago Grain Door Co.* v. *Chicago, B. & Q. R. Co.*, 137 Fed. 101, the Court by Sanborn, J., stated the principles applicable to the filing of a supplemental bill where there existed no cause of action at the time of the filing of the original bill. The Court said:

> "The rule that there can be no supplemental bill *when the complainant has in fact no cause of action when suit commenced*, and neither states a case, *nor can do so*, is too well settled to require extended citation. *Mellor* v. *Smither, supra; New York, etc., Co.* v. *Lincoln, etc., Co.* (C. C.), 74 Fed. 67; *Bernard* v. *Toplitz*, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465; *Putney* v. *Whitmire* (C. C.), 66 Fed. 387; *Pinch* v. *Anthony*, 10 Allen 477; *Hughes* v. *Crane*, 135 Ill. 519, 26 N. E. 517. It is equally well settled in patent cases that complainant must have a cause of action when the bill is filed. *Judson Mfg. Co.* v. *Burge-Donaho Co.* (C. C.), 47 Fed. 463; *Slessinger* v. *Buckingham* (C. C.), 17 Fed. 454. In *Humane Bit Co.* v. *Barnet* (C. C.), 117 Fed. 316, this rule was carried so far as to dismiss the bill *where the proof showed infringement after the filing of the bill, but before service of subpoena*, following *Farmers' L. & T. Co.* v. *Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, deciding that suit is begun when the bill is filed.
>
> "The limited purpose of a supplemental bill is to *repair or add to a good original case*, shown by an original bill, good or bad, either to supply defects sometimes existing when suit brought, but usually afterwards occurring, or to support, fortify, or re-enforce.

In *Mellor* v. *Smither*, 114 Fed. 116, the Court said:

> "The correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. *If he had no cause of action then, he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill.* 1 Beach, Mod. Eq. Prac., Sec. 496; *Straughan* v. *Hallwood*, 30 W. Va. 274; 4 S. E. 394, 8 Am. St. Rep. 29; *Hill* v. *Hill*, 10 Ala. 527. But where a cause of action exists at the filing of the bill which

> is defectively presented by the bill, the defects may be remedied by amendment (Equity Rules 28, 29), and matters occurring after the filing of the bill may be presented by supplemental bill (Equity Rule 57; *Jenkins* v. *Bank*, 127 U. S. 484, 486, 8 Sup. Ct. 1196, 32 L. Ed. 189; *Horie* v. *Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802.) Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. *Stafford* v. *Hoxlett*, 1 Paige Ch. 200. *But, in cases where the plaintiff had no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent to the filing of the bill can prevent its dismissal.*"

In *Putney* v. *Whitmire*, 66 Fed. 385, the Court sustained demurrers to the original bill, although the supplemental bill alleged subsequently occurring facts which would have sustained the original bill. Said the Court:

> "It is not possible to resist the result of these authorities. This objection to the jurisdiction must be sustained.
>
> "Has it been cured by the supplemental bill? The rule is that *if an original bill is defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon the matters which have subsequently taken place*. 2 Daniell, Ch. Prac. (Perkins' Ed.), p. 1595, note; *Candler* v. *Pettit*, 1 Paige 168; *Bernard* v. *Toplitz*, 160 Mass. 162, 35 N. E. 673."

In *New York Security & Trust Co.* v. *Lincoln St. Ry. Co.*, 74 Fed. 67, Judge Shiras overruled demurrers to the complaint on the ground that the original bill set forth a cause of action which was merely supplemented by the allegations of the supplemental bill. He held, however, that the insufficiency of the cause of action stated in the original bill might not be supplied by supplemental bill. He said:

> "The question is whether the original bill set forth a substantial cause of action, for it is admitted

by counsel for complainant that, if the original bill fails to set up a state of facts justifying the relief sought, or, in other words, *fails to set up a cause of action then existing, a supplemental bill, based upon facts occurring after the filing of the original bill, cannot be sustained. Bernard* v. *Toplitz*, 160 Mass. 162, 35 N. E. 673; *Shields* v. *Barrow*, 17 How. 130; *Candler* v. *Pettit*, 1 Paige, 168. If, however, the original bill is well founded, or, in other words, sets forth a cause of action and ground for relief, then it is permissible to set forth in a supplemental bill facts happening after the filing of the original bill, which show that complainant is entitled to further relief, within the scope of that sought in the original bill."

A case very much in point is *Bernard* v. *Toplitz*, 160 Mass. 162, 35 N. E. 673, frequently cited with approval in the decisions above referred to. In that case suit was brought to redeem an instrument in the nature of a mortgage, which suit, however, was prematurely instituted because, at the time it was brought, the mortgage was not due. At the time of the trial, however, the mortgage had become due. The plaintiff contended that for that reason the premature institution of the suit might be cured by supplemental bill. The Court held to the contrary, and, by Knowlton, *J.*, said:

"*At the time of the hearing*, the plaintiffs were entitled to redeem, and the question is whether a decree for redemption can be entered in this suit, or whether their right to redeem can be enforced only in a suit brought after it came into existence. *We are of opinion that this action cannot be maintained. It is a general rule that the rights of parties in litigation are to be determined as of the time when the action was brought.* The exceptions to this rule relate only to supplemental, incidental, or technical matters, which are not of the substance of the plaintiff's right. If the original bill is sustainable, a supplemental bill may be filed, or, under our practice, the bill may be amended by alleging matters occurring subsequently, so as to present facts which will enlarge the extent or change the kind of relief. 1 Daniell, Ch. Pr. (3d Amer. Ed.) 1594, and notes; *Chandler* v. *Pettit*, 1 Paige, 169."

The District Court seems to have ignored these authorities. It said (Record, page 1971):

> "*The ancillary bill filed* makes clear the denial, by the Commission, of a hearing as asked when schedules were filed on February 1, 1928, and moreover, that the defendants actively sought the aid of the state court in enjoining the plaintiff from proceeding to enforce its rates as provided in the schedules."

Whether by the "*ancillary* bill" was intended the "*Supplemental* Bill" is not important. It is sufficient that these facts and the refusal of the Commission to permit an increased rate are alleged, *and could only be alleged*, in a Bill filed after the institution of this suit, for the reason that the facts thus set forth had not occurred when the Original Bill was filed.

We repeat, therefore, that the plaintiff's attempt to circumvent the jurisdiction of the State Court must fail. If it should not fail it would result in introducing a practice susceptible of manifest abuse. The result would be that any party, determined to escape the jurisdiction of a State Court, would institute suit in the Federal Courts *before his cause of action had accrued* and thus anticipate, or attempt to anticipate, a suit against him in the State Courts.

He would then contend, precisely as the plaintiff contended in its ancillary action here, that the suit in the State Courts should be stayed "without any consideration of the merits of the original action" (Supplemental Record, page 129). If he were successful in destroying the proceedings in the State Court by ancillary suit he would then, *after* his cause of action had accrued, file a "*Supplemental*" Bill supplying—*nunc pro tunc*—the vital deficiency of the Original Bill, and (if that were permitted to be done) he would have succeeded in defeating every principle with respect to the priority of jurisdiction of State and Federal Courts.

II.

No right Secured to the Plaintiff by the Constitution of the United States was Violated by the Refusal of the Commission to Exercise a Duty imposed by State Statute to Relieve the Plaintiff from the Operation of its Contracts however Unprofitable they may be.*

It must be admitted, *and the District Court concedes* (Record, pages 1979, 1987) that were it not for the existence of the Public Service Commission Law the plaintiff would not be entitled to relief from the contractual rate of fare, no matter how unremunerative that rate may be.

Columbus Railway & Power Co. v. *Columbus*, 249 U. S. 399.

Public Service Commission v. *St. Cloud*, 265 U. S. 352.

Paducah v. *Paducah Railway*, 261 U. S. 267.

Georgia Railway Co. v. *Decatur*, 262 U. S. 432.

Southern Utilities Co. v. *Palatka*, 268 U. S. 232.

Since, therefore, the right to collect a fare in excess of the contract rate *is not a right existing under the Constitution*, the "right" asserted here involves the enforcement of a *statutory* right which proceeds exclusively *from the Public Service Commission Law*. So far as the *Constitutional* rights of the plaintiff are concerned an increase in the rate is a mere privilege which the State might withhold or grant at its pleasure and with respect to which it could impose whatever conditions it pleased. It must, therefore, be evident that the State of New York was under no obligation to enact, nor has the plaintiff any standing

* NOTE—This and the succeeding Divisions of Part I further answer the contention that the five-cent fare on the Elevated Lines is *statutory* under Section 743 of the Laws of 1894. If, as we propose to show, the Contracts here are binding as between the parties, until modified under the police power of the State, the five-cent fare now in effect is *contractual* under Contract No. 3 and the Certificate and *not statutory* under Section 743 of the Laws of 1894, enacted almost twenty years previously. An injunction against the enforcement of Section 743 of the Laws of 1894 would have no effect upon the *contractual* rate at which the Rapid Transit Lines are now in operation.

in a Federal Court to compel the execution of the provisions of the Public Service Commission Law.

Referring to this question this Court in *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, said (pp. 382-383):

> "The question whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 375; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228, 232) *there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking.* The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but *it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be.* Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies and at the same time conditions its exercise."

Since, as the District Court concedes the Legislature was under no Constitutional duty to enact, and *at this moment* is under no duty to continue the existence of, the Public Service Commission Law, under the provisions of which *alone* the "right" here asserted is said to exist, it is evident that that "right" is a *mere statutory privilege*. The Legislature might, if it desired, abolish or curtail that privilege either by repeal or by amendment of the Public Service Commission Law (*precisely as it did in 1922*), leaving the parties to these Contracts in the position in which their Contracts had placed them. Since it could abolish that privilege it could surround its exercise with any conditions that it might impose and, accordingly, it

might, although it has not done so, deny to such a party the right to any hearing on its application; it might, although it has not done so, refuse to such a party any right to review by Certiorari the Order of the Commission or it might prescribe any other conditions, reasonable or unreasonable, to the statutory privilege thus allowed. That the Legislature has provided for review by Certiorari of any Order made by the Commission under the Statute is merely the grant of an additional privilege that, under the Constitution, the Legislature was not under any obligation to allow.

The District Court has sought to distinguish the *Columbus Railway Company case* and similar cases on the theory that there the State had not established *a regulatory plan* such as is provided by the Public Service Commission Law. The District Court said (Record, pages 1986-1987):

> "In the latter case (the *Columbus Railway Company case*), a franchise was granted a railroad company which sought to surrender it and then brought an action to restrain the city authorities from compelling it to operate its lines of street railway under the franchises and to charge only rates of fare prescribed by the franchises. The Court held that equity cannot relieve the company from a bad bargain. At the time the railroad company sought relief *the Legislature of Ohio had not, like in the instant case the Legislature of New York had, in the exercise of state sovereignty, established a regulatory plan by which franchises and contract rates may be regulated upward or downward as conditions justify.*"

The District Court accordingly held that since by Sections 26, 29 and 49 of the Public Service Commission Law the Commission *was under the statutory duty to increase the rate of fare* specified in the Contracts and had refused or intended to refuse to do so a Federal Court had power to do what the Commission had refused to do. The Court said (Record, page 1993):

> "The denial by the Commission of a change of rate of fare is a denial of due process of law * * * A forced continuance of confiscatory rates amounts to a denial of due process of law."

Again it said (Record, page 1989):

> "The Commission was created by the Law not to initiate or establish a public policy or standard, but to administer and execute that established by the Legislature."

We submit that the District Court has here confused the *statutory* rights of the parties with the rights of the parties under *the Constitution* of the United States. If the Commission has misapplied the "standard declared in the law itself," which the Commission was established "to administer and execute," the remedy is by Certiorari in the Courts of the State that undertook to allow a remedy which the State was not required to afford by the Constitution of the United States. Since the relief thus afforded to the carrier (to be absolved from its contract) is not anything to which the carrier is entitled by the Federal Constitution, the failure of the Commission to adhere to the principles established by the Legislature does not violate any Constitutional rights secured to the carrier. Whatever duty rests upon the delegate to modify the Contract is a duty of the delegate to the State by which it was created and for the failure by the delegate to perform that duty it is responsible to the State Courts and to them alone.

The subject may be examined from another point of view which takes into account, not the relation *between the State and its agencies*, which we submit to be immaterial here, but the relation between *the plaintiff and the State of New York*. What Constitutional right of the plaintiff, we inquire, has been violated by the State of New York, *acting through all its agencies combined*, in refusing to permit the plaintiff to charge a fare in excess of the Contract rate? If it be true, as it is conceded, that the State was under no obligation to provide any method of relief, upon what theory of Constitutional right could the Federal Court require a subordinate legislative agency to grant relief which the state, *as an entity*, was not required to afford?

Of course, if the plaintiff were not under contract concerning the rate to be charged an entirely different ques-

tion would arise, because there its right to a compensatory rate would rest upon the Constitution *regardless* of any statutory right. Neither the failure of the State to have enacted the Public Service Commission Law, nor its amendment or repeal, could in the least abridge that Constitutional right.

But in the case at bar the Public Service Commission Law *might at any time have been repealed or amended by the Legislature, or the Transit Commission itself might at any time have been abolished.* In any of these contingencies what would remain of the plaintiff's contention that the provisions of the Public Service Commission Law requiring the Commission to increase the Contract rate were the bulwark of its *constitutional* rights?

The *contrast* between the effect of a repeal of the Public Service Commission Law in cases where there is no contract with cases where the rate is contractual shows the extent to which the plaintiff's "rights" depend upon the Statute and not upon the Constitution.

This being so, on what theory has the plaintiff any standing in a Federal Court, even if the Commission has failed to exercise *its statutory duty* to relieve the plaintiff from the operation of a Contract from which it is not entitled to be released by any provision of the Constitution? The Federal Courts are not concerned with whether a statutory body has failed to exercise its statutory duty *except to the extent that the failure to exercise such a duty has impaired a Constitutional right.* The *State* Courts would, indeed, on Certiorari be concerned with the plaintiff's *statutory* right arising from the Commission's *statutory* duty, but this Court is concerned only with a violation of the plaintiff's *Constitutional* rights.

Inherently, therefore, this is not a rate case in any accurate sense of that term. It is a case involving Contracts from which the plaintiff claims to be entitled to relief *only on account of the existence of a State statute*, which, the plaintiff contends, is not being properly executed by the Administrative Agency. For this alleged misconstruction of the Statute, not impairing *any Consti-*

tutional right, neither the State nor the Agent is responsible to any Federal authority. Although under the Statute the refusal of the Commission to act might involve the denial of a "legal" right, yet so far as the Constitution is concerned, the "right" thus denied *is a mere "privilege" or "act of grace,"* the denial of which presents no Federal question. It is therefore no inconsistency to say that a *statutory right* may be a *Constitutional privilege.*

Brearley School v. *Ward*, 201 N. Y. 358.
Laird v. *Carton*, 196 N. Y. 169.
Bull v. *Conroe*, 13 Wisc. 233.
In re Seaholm, 136 Fed. 144.
Cooley on Constitutional Limitations (7th Ed.), p. 546.

A case directly in point and wholly indistinguishable is *Henderson Water Co.* v. *Corporation Commission*, 269 U. S. 278. There the Water Company was operating under a contract with the City (*not* made, however, with legislative authority) prescribing maximum rates. It applied to the Corporation Commission of the State of North Carolina, a body vested not only with full authority but with *the duty* to regulate the rates of public utilities, for an increase of ten per cent., alleging the contract rate to be confiscatory. The Commission granted a slight increase in the rate but denied further relief with the reservation that after a test period of six months the Water Company might again apply for such relief as might seem justified.

The Company contended that the increase thus granted was not sufficient and brought suit in the District Court of the United States alleging the rate, even as thus increased, to be confiscatory. It was contended upon the authority of *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, that if the rate was confiscatory under the Federal Constitution the postponement of *full* relief for six months would constitute the denial of a constitutional right. The plaintiff there contended, precisely as the plaintiff contends here, that since the State had established *"a regulatory plan"* over rates by establishing a Commission charged with *the duty* to regulate rates, the failure of

the Commission to afford adequate relief presented a question arising under the Constitution of the United States. The situation, therefore, was identical with the situation which we have assumed to exist in case at bar, because there, as here, there existed *"a regulatory body" charged with the duty of rate regulation.*

The Court held that, *since the Water Company was bound by contract with the City,* it was not in a position to assert that the failure of the Commission to grant adequate relief under the Statute creating it *constituted any infringement of a Constitutional right.* In other words, it was held that the right of the Water Company "bound by the terms of a contract with the City" to relief by the Corporation Commission "speaking for the State" was not a constitutional right and that, accordingly, the Water Company did not "have any standing to ask for a fixing of rates in excess of the franchise rates." The Court said (pp. 281-282):

> "The present case differs from the cases cited, in that *when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city* contained in its franchise, to furnish water at a low schedule of rates fixed therein. *It was not entitled to any judicial relief from this situation, however inadequate the rates. Columbus Railway Company* v. *Columbus*, 249 U. S. 399; *Public Service Company* v. *St. Cloud*, 265 U. S. 352. *Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. Trenton* v. *New Jersey*, 262 U. S. 182."

The District Court seeks to distinguish the *Henderson Case* on the theory that there

> "The parties were bound by contract made *before* the State had adopted its corporation commission law and thereby exercised its regulatory power."

The statute under consideration in the *Henderson Case* (Sec. 1066 of the Consolidated Statutes of North Carolina of 1919) provided

> "COMMISSION TO FIX RATES FOR PUBLIC UTILITIES. Subject to the provisions as to passenger rates in the chapter of railroads and as to railroad freight rates in this chapter *the commission shall make reasonable and just rates and charges in intrastate traffic and regulate the same.*"

The Supreme Court of North Carolina had accordingly decided that the Corporation Commission had jurisdiction to increase, *as it had in fact in that case increased* (but not to the extent demanded) the rates established by the contract made *before* the enactment of the regulatory statute. (*Corporation Commission* v. *Henderson Water Co.*, 190 *North Carolina*, 70.) By that decision, which was referred to by *this Court* in its opinion, the Supreme Court of North Carolina held that

> "When the Corporation Commission is called upon by either the corporation or those to whom the services are rendered under its franchise to exercise this power and authority *it is its duty* to fix and establish just and reasonable rates to be charged for such services."

The Supreme Court of North Carolina accordingly *had held that the statute was applicable to contracts made before as well as to contracts made after* its enactment and had granted the petition of the *Water Company* for a slight increase of rates. The *Water Company*, however, contending that a greater increase should have been allowed and that even the rate as thus increased was "confiscatory," appealed to this Court. This Court held that, since the *Water Company* was bound by contract with the City, *even though that contract was subject to the jurisdiction of the Commission*, it was not entitled to relief under the Constitution of the United States, *but must secure relief from the Commission*, if at all.

To illustrate our argument, let it be supposed that the Governor should delegate to a Board, as is often done, the

duty **to exercise his power of Executive clemency with clear instructions concerning the procedure to be followed and the principles upon which it should be exercised. Let it be supposed, furthermore, that such a Board should violate the fundamental principles under which that duty was *required* to be performed: Will it be suggested that a person, whose application *for clemency* is thus improperly denied, can invoke the Constitution of the United States to secure relief? Is it not obvious that the "right" is one that the Constitution of the United States does not protect but which is altogether *statutory* and which is only enforceable in the State Courts.**

How then can any Federal question be said to be involved because the Commission did not permit a "right" to be exercised that the Legislature could at any moment have withdrawn. In fact, this is precisely what the Legislature did in 1922 when it inserted the "proviso" in Section 49 expressly withholding from the Commission power to increase these rates under the provision inserted in 1920 and repealed in 1923. It could not, of course, have done this with respect to rates not fixed by "contract," "franchise condition" or "other agreement," but since doing this resulted merely in requiring a contracting party to perform a contract, it did not (and it is not contended that it did) violate any right secured by the Constitution of the United States.

In *People* v. *Rosenheimer,* 209 N. Y. 115, the defendant had been convicted under a provision of the Highway Law which required, under severe penalties, that any person who in the operation of a motor vehicle had caused injury to person or property should stop and furnish information concerning his identity. Rosenheimer was indicted for violating this statute. The indictment was dismissed by the Appellate Division of New York State on the ground that the statute required the driver of a motor vehicle to incriminate himself and was, therefore, unconstitutional. The Court of Appeals held to the contrary on the ground that the right to operate a motor vehicle was a *privilege* accorded by the State and not a right. Since it was a

privilege, it could be surrounded and limited by whatever conditions the Legislature might determine. The Court by Cullen, Ch. J., said:

> "There is one ground upon which, in my opinion, the validity of the statute can be safely placed. The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state. It has been so held in *State of Maine* v. *Mayo* (106 Me. 62), and *Commonwealth* v. *Kingsbury* (199 Mass. 542)."

Continuing the Court said:

> "If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure any one in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway or even that in its operation injury to persons or property shall be a crime, but only that failure by the operator, in case of such injury, to identify himself shall be criminal. I cannot see why the greater power does not include the less. *Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised.* This principle was recognized by us in the case of *Ives* v. *South Buffalo Ry. Co.* (201 N. Y. 271). In that case we conceded that in a work of such a nature that the legislature might prohibit its exercise altogether, it might prescribe the terms on which it could be carried on."

In *People* v. *Crane*, 214 N. Y. 154, a statute of New York forbade the employment by contractors of aliens on public works. The statute was challenged as unconstitutional, but was sustained on the ground that the right to be employed on public work was not a right but a

privilege which the State could refuse and therefore could curtail. He said:

> "To concede that such a preference was intended is not to condemn the statute as invalid. The State, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. *Whatever is a privilege rather than a right may be made dependent upon citizenship.*"

Again he said:

> "To be employed by the State on the public works and to receive payment out of the public purse *is, I think, a privilege rather than a right* (*Atkin* v. *Kansas*, 191 U. S. 207)."

The decision of the Court of Appeals was affirmed by this Court (*239 U. S. 195*).

In *Christ Church* v. *Philadelphia*, 24 How. 300, the Legislature had exempted the property of Christ Church Hospital from taxation "so long as the same shall continue to belong to said Hospital." Subsequently this exemption was repealed. This Court sustained the repeal on the ground that the statute conferred a privilege which the State was under no obligation to allow, saying:

> "It is in the nature of such a privilege as the act of 1833 confers that it exists *bene placitum* and may be revoked at the pleasure of the sovereign."

Since no right of the plaintiff under the Constitution is involved, it is immaterial whether the denial of relief occurred upon the plaintiff's application under Section 29 in 1928 or under Section 49 in 1920 and in 1921. It is *the nature of the right* that must determine the question of Federal jurisdiction. If the "right" asserted is one that is not secured by the Constitution but is a mere privilege or a statutory right, the *method* by which it is abridged is immaterial. Under Section 49 an increase in the contractual rate could not take effect except with the *approval* of the Commission; under Section 29 (assuming that Sec-

tion to be applicable to such a case) the increase could not take effect without the *concurrence of the* Commission. Under Section 49 an increase could not take effect *unless* the Commission said "Yes." Under Section 29 the increase could not take effect *if* the Commission said "No." In 1920 and 1922 on the plaintiff's application under Section 49 the Commission refused to say "Yes" and in 1928 on the plaintiff's application under Section 29 the Commission unequivocally said "*No.*"

See particularly:

Wichita Railroad & Light Co. v. *Public Utilities Commission of the State of Kansas*, 260 U. S., 48.

III.

The Contracts here were Binding as Between the Parties until the Commission Exercised the Power, and Performed the duty, Delegated to it by the Legislature, by Increasing the Contract Rate in the Manner Provided by the Public Service Commission Law.

The District Court seems to have proceeded on the theory that because the Legislature has delegated to the Commission *the power, coupled with the duty*, to increase non-compensatory rates, *the Legislature has thereby increased the rate*, notwithstanding the *refusal of the Commission* under Section 49 to increase, and its refusal under Section 29, to permit an increase, of the rate. In so holding the District Court failed to recognize that until the power thus delegated *had been exercised by the Commission and the duty thus imposed had been performed*, the rate remained unchanged and the Contract remained binding as between the parties.

It has been directly held by this Court that the binding effect of such contracts *as between the parties* was not impaired because, under State law or Constitution, the Legislature retained "unfettered power" at any moment to revise the Contract rate.

> *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232.
> *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215.

In the *Palatka case* the contract was sought to be avoided on the ground that the rate had become non-compensatory and that since the Legislature might at any time intervene and change the contract rate the parties to the contract were no longer bound. This Court held that the power of the Legislature to change the rate did not prevent *the parties* from making a binding contract with respect thereto which would remain binding *as between them* until the rate *had been changed* by State authority. This Court said (page 233):

> "The Supreme Court (of Florida) held that the City had power to grant the franchise and to make

> the contract and that it had no power of its own motion to withdraw, *but it concedes the unfettered power of the legislature to regulate the rates.* On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that in the absence of contract it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the Company in consideration of the grant of the franchise might not bind the Company in some cases, even if it left the City free, *it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432, 438. *Opelika v. Opelika Sewer Co.*, 265 U. S. 215, 218. Such a notion logically carried out *would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain.* There is nothing in this decision inconsistent with *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539; *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, and *Ortega Co. v. Trinity*, 260 U. S. 103."

In the *Opelika case* the Sewer Company had entered into a contract with the City of Opelika for a period of thirty years, authorizing the Company to charge not in excess of certain specified rates. The Constitution of the State of Alabama provided that no law

> "making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant of a franchise, privilege or immunity, *shall forever remain subject to revocation, alteration or amendment.*"

Notwithstanding this provision an irrevocable contract for a term of thirty years had been made with the Sewer Company.

The District Court held that no valid contract existed and, accordingly, granted an injunction against the rate. The decree of the District Court was reversed by this Court where the question presented was thus stated:

> "It is to be taken that the present rates which the plaintiff seeks to increase are confiscatory *unless*

> *the City has a right to insist upon them* and the question before us is whether the City has that right by contract or whether its enforcement of them deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States, as alleged in the bill. *Cincinnati* v. *Cincinnati & Hamilton Traction Co.*, 245 U. S. 446. The District Court held that there was no valid contract and issued an injunction as prayed. The City appealed to this Court."

It was held that notwithstanding the provision of the State Constitution referred to, the contract between the City and the Sewer Company, *although subject to revocation by the State*, was valid. The Court, with special reference to this provision of the State Constitution, said:

> "No doubt it is true also that the Legislature could not make such a grant indirectly by giving power to a City to make it. But we see no reason to doubt that the Legislature, *without impairing its power to revoke*, may give a City power to make a contract *from which the City, of its own motion, may not recede. The City has not attempted to recede from it.*"

Again it was held, therefore, that although the Legislature expressly reserved "its *power* to revoke," that fact did not affect the validity of the contract *as between the parties* and that, accordingly, the parties "of *their own motion* may not recede." The paramount right of the Legislature, even in a case where it was conceded to exist, to "revoke" the contract did not affect the inviolability of the contract *as between the parties* until the State *had exercised* that right. It was a right pertaining to the *State* and not pertaining to the *parties*.

The District Court has attempted to distinguish the *Palatka case* (the *Opelika case* is not referred to in its opinion) on the theory that there

> "the legislature had no commission and no regulatory procedure which the corporation could invoke to bring about an increase which it sought."

It suggests the distinction, therefore, between the power of the Legislature to revise the rate and that of the Agency

to which the Legislature has delegated the rate-making power and upon which it has imposed *the duty* to exercise that power upon specified conditions. The answer is that the delegation of that legislative power, even though coupled with that duty, does not constitute *an exercise of the rate-making power of the State until the Commission has acted and by Order has increased the contract rate*. This the Commission, whether rightly or wrongly, has not done, but on the contrary has refused to do, and the Contracts, accordingly, remain binding *on the parties* even if they are subject to alteration by the State.

We will consider this question:

(a) Upon principle, which requires consideration of the provisions of the Public Service Commission Law.

(b) Upon authority, which requires consideration of the decisions of this Court and of many State Courts where such regulatory laws have been construed.

(a)

The State Did Not Exercise Its Rate-making Power Until the Commission Exercised That Power by Making an Order Increasing, or by Approving the Increase of, the Contract Rate.

This is evident from a consideration of the provisions of the Public Service Commission Law, which show that the provisions of the Law *do not operate directly on the contract or the rate*, but operate only *by Order to be made by the Commission*. Indeed, if it had been intended that the provision of the Law that rates should be "just and reasonable" should operate *directly* on the contract or the rate, what was the commission established for and why was it required to "*determine*" the rate whenever "in *its* opinion" that was necessary and to "*fix the same by Order* to be served upon all common carriers"?

It is evident that the general provision of Section 29 that rates shall be "just and reasonable" (although limited as we will soon show) was a mere declaration of the rule of common law applicable to carriers, but was as ancient

as common carriers themselves. But the Legislature was not satisfied to leave this question to mere inference because, immediately after providing that rates should be "just and reasonable," it inserted a specific limitation that they should be

> "*not more* than allowed by law *or by Order of the Commission* having jurisdiction *and made* as authorized by this chapter,"

adding moreover a further prohibition at the conclusion of Section 26 that any rate

> "*in excess* of that allowed by law *or by Order of the Commission* is prohibited."

This is confirmed by the provisions of Sections 29 and 49, both of which give the Commission the widest possible control over rates and particularly by the provisions of Section 33 that

> "No common carrier shall charge * * * a greater or less or different compensation * * * than the rates * * * specified in its schedules filed *and in effect at the time*."

Since the Commission is given power under Section 49 "by Order" to "determine" and "fix" the rate to be charged and since by Section 29 it is vested with identical authority over any amendatory schedules, it is evident that the Order of the Commission determining and fixing the rate *constitutes the exercise of the Legislative power delegated to it*.

Any other rule would result in chaos. It would mean that the rate would be *automatically void* if at any time it became unreasonably low or *unreasonably high* and that, accordingly, *without action by the Commission* the rate thus invalidated might be *collaterally* challenged by any person, whether passenger, shipper, carrier or municipality. It would, moreover, make the rate-making functions of the Commission altogether superfluous and would make superfluous also any Order of the Commission, which under the Public Service Commission Law is expressly required to "fix" the rate.

From these considerations alone it must follow that it could not have been intended that rates should automatically go up or down until after proper proceedings before the Commission had been taken *and an Order made*, or unless the findings of the Commission, whether of law or fact, were modified on *direct* review by Certiorari.

(b)

This Principle Has Been Sustained and Applied by This Court and by the Courts of Every State in Which the Question Has Arisen.

In *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, this Court repudiated the contention, which has been sustained by the District Court, that the mere delegation of authority by Congress to the Interstate Commerce Commission, coupled *with the duty to exercise that power*, was equivalent to the exercise by Congress of the power thus conferred.

There the question related to the right of the State of Kansas to prescribe certain regulations with respect to the Missouri Pacific Railway which was engaged both in Interstate Commerce and in commerce within the State of Kansas. The mere existence of the *power* of Congress under the Constitution to regulate commerce did not, upon familiar principles, prevent the States from exercising that power. Only in the event of the *exercise* of the power by Congress were the States prohibited from exercising incompatible authority. This had been decided by this Court in *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 Howard, 299, cited with approval in the *Larabee Case*, where the Court said at page 621:

> "The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. *Sturges* v. *Crowninshield*, 4 Wheat. 193; *Houston* v. *Moore*, 5 Wheat. 1; *Wilson* v. *Blackbird Creek Company*, 2 Pet. 251."

By the Interstate Commerce Act as amended in 1906 (Chap. 3591, L. 1906) it had been provided:

> "That the Commission is authorized and empowered, *and it shall be its duty*"

to regulate the matters specified in the Act.

It was contended that since Congress had created the Interstate Commerce Commission *and had delegated to that Commission power over interstate commerce together with the duty to exercise that power*, the State might not regulate the matters thus delegated to the Commission. This Court, however, held to the contrary and decided that *the mere delegation of power and duty* to the Commission was *not equivalent to its exercise and that until the duty thus imposed was exercised by an Order made by the Commission* the State of Kansas might enact such regulations. The language of the Court is very applicable to the question here involved.

> "On the other hand, it is said that Congress *has already acted*, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress *has entrusted power to that commission does not, in the absence of action by it*, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. *A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State.* It is not contended that *the commission has taken any action* in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. *Until then* the authority of the State in merely incidental matters remains undisturbed. In other words, *the mere grant* by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and *in the absence of action by the commission* interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its

> citizens. Running through the entire argument of counsel for the Missouri Pacific is *the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained.*"

This precise question was decided in *City of Manitowoc* v. *Manitowoc & Northern Traction Co.*, 145 Wis. 13 (129 N. W. 925), cited and quoted with approval by this Court in *Milwaukee Electric Railway & Light Co.* v. *Railroad Commission*, 238 U. S. 174. There a contract had been executed between the municipality and the utility corporation limiting the rate of fare to ten cents. The Statute of Wisconsin, however, which was substantially the same as the Public Service Commission Law of New York State created a Railroad Commission with powers which were also substantially identical with the *regulatory* powers of the Transit Commission. It was, therefore, contended by the utility corporation that its contract with the city for an unremunerative rate of fare had become invalid and that it was therefore entitled to charge a "reasonable" fare. The Court held that the contract remained valid *as between the parties* until modified by the Commission and that *the enactment of the statute providing for reasonable rates and the creation of the Commission to apply that standing* did not invalidate the contract. The Court said:

> "*No specific authority having been conferred on the city to enter into the contract* in question, the right of the state to interfere whenever the public weal demanded was not abrogated. *The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer.* To this extent and to this extent only is the contract before us a valid subsisting obligation."

Holding, however, that the statute did *not* invalidate or modify the contract until *action* had been taken by the Commission, the Court said:

> "*Whether the state has exercised its right to modify this rate remains to be considered.* Chap-

ter 362, Laws 1905, applies to interurban railway companies. In re Application of Chapter 362, Laws 1905, to Certain Street Railways, 1 Wis. R. R. Com. Rep. 178. *By that statute (section 3) it is provided that all charges made by any carrier coming under its provisions 'shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.'* Railway Companies are required (section 4) to file their tariffs with the Railroad Commission, and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the Act. • • •

It is contended that this law has superseded the contract involved in this suit and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the Railroad Commission the power to determine the fact as to whether or not a given rate was reasonable. When the determination was reached the law became operative upon the particular rate called in question, and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by the law. The Railroad Commission has made no determination in the case before us; at least, if it has it is no part of the record. Until that determination is made, the contract is in force. When it is made, the contract is superseded, if the rate is changed. • • •

This is a question which calls for the exercise of legislative policy and discretion. *The court cannot relieve the defendant from an improvident contract*, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. • • •

The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment enjoining the defendant from changing the rates of fare between the cities of Manitowoc and Two Rivers provided for in the ordinance of November 24, 1902, *until such time as such rates are changed by the Legislature, or through a legislative agency in the manner provided by law.*"

To the same effect was the decision in *Monroe* v. *Detroit M. & T. Short Line R. Co.*, 187 Mich. 364, 153 N. W. 669, where there was a contract between the City and the utility corporation. It was contended for the Company that the State Utility Act operated as a revocation of any power the city might have had to contract concerning the service to be furnished by the Company. Referring to this contention the Court said:

> "The rule that contracts such as the one here involved *are made subject* to the necessities of police regulation is recognized by this court."

Continuing, however, the Court said:

> "It does not follow that because the contract may yield to the exigency of public necessity, *when such exigency has been determined in a proper case and manner*, by competent authority, that the respondent, a party to the contract, may ignore the contract obligation, plead the public or its own convenience as an excuse *and remit the relator to a commission for relief*. On the contrary, it seems wholly reasonable that it should perform its contract obligations *until relieved therefrom by competent authority*."

This question was again decided in *Lenawee County Gas & Electric Co.* v. *City of Adrian*, 209 Mich. 52 (176 N. W. 590). There, also, the City and the Gas Company had entered into a contract concerning the price to be charged for gas. At the time of the contract there was in existence a regulatory body having jurisdiction over public utility corporations and it was contended by the corporation that the contract, on account of altered conditions, had become unreasonable and unenforceable. The Court said:

> "Failing in its efforts to obtain the desired relief by voluntary action of the electors or officials of the city, plaintiff filed this bill to enjoin enforcement of the ordinance on the ground—
>
> 'that section 8 of said ordinance of the city of Adrian as amended has become and is unreasonable, illegal, null, and void, because the enforce-

ment thereof would (a) deprive the plaintiff of its property without due process of law; (b) take the plaintiff's property without just compensation; (c) deprive the plaintiff of the equal protection of the law.'

These constitutional grounds of objection *are necessarily predicated on a lack of contractual power in the municipality to enter into a contract with plaintiff fixing the price it shall charge for gas, as a contract is commonly understood to mean and is legally defined;* for if the result of their accepted relations was in the first instance a valid binding agreement, which the contracting parties were competent to make, the fact that it proved to be an unprofitable or losing contract to one of the parties could not render its enforcement by the other unconstitutional; neither does equity relieve from hard bargains simply because they are hard, even though made so by the World War. *Columbus Ry. L. & P. Co.* v. *Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 69 L. Ed. 669; *Moorhead* v. *Union Light H. & P. Co.* (D. C.), 255 Fed. 920.

The keynote of plaintiff's contention is that under our Gaslight Company Laws and State Constitution, rates fixed by a city franchise must at all times be reasonable, setting a limitation on a municipality beyond which it cannot go by contract or otherwise; and that any rate fixed by franchise, although reasonable, satisfactory, and agreed to by both parties at the time, cannot bind the contracting parties for the stipulated period of the franchise, or for any definite time, but whenever such rates in fact become unreasonable they become unlawful and unenforceable. This construction not unnaturally suggests clearly whether such a contract becomes lawful and enforceable again when the pendulum swings the other way, and so on back and forth, during the agreed life of the franchise.
* * *

It is said, and not disputed, that this franchise, and all its amendments, were agreed upon and enacted on plaintiff's initiative. That of 1915 was upon plaintiff's written proposition of which a contract for lighting the White Ways of the city was a part. Both were accepted by the city and by plaintiff in writing. Presumably the rate contract

> was reasonable at the time it was made, and there is no claim to the contrary."

After careful consideration of the authorities, therefore, including *City of Monroe* v. *Detroit, etc., Ry.*, 187 Mich. 364, 153 N. W. 669, to which we have already referred, *it was held that the existence of a regulatory body, charged with the duty of regulating rates, did not invalidate such contracts* and that until *action had been taken by that body* the contract remained binding *on the parties*.

In *Henrici* v. *South Feather Land Co.*, 177 Cal. 442 (170 Pac. Rep. 1135), a similar contract was sustained and was held to be binding on the parties until "superseded *by order*" of the body vested with jurisdiction over rates. Said the Court:

> "The obligation to furnish water at the agreed rate was unlimited in time and *continued until the rate was superseded by Order of a public body vested with the power of regulating the service.*"

Again, in *Southern Pacific Co.* v. *Spring Valley Water Co.*, 173 Cal. 291 (159 Pac. Rep. 865), the highest Court of California held that such contracts were:

> "*subject to revision by competent authority*, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and *such contracts may, by such authority, be reformed accordingly*, to make them conform to the public interest."

The Court held, however, that *until thus reformed* the contract, *as between the parties*, was valid and enforceable. Referring to authorities on this question the Court said:

> "In the case first cited it is said that *the power to fix rates and regulate public service of water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts; to that extent said contracts may be reformed.' But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts as declared in our decisions above cited.*"

In *Salt Lake City et al.* v. *Utah Light & Traction Co.*, 52 Utah 476 (173 Pac. 556), the traction company had obtained an increase in rates from the State Commission. The city objected to the increase on the ground that the rate was fixed by contract and could not be changed even by State authority. The Court held that the State Commission had power to change the rate but it was expressly conceded that *unless* changed by the Commission the rate was binding *as between the parties*. On this subject the Court said:

> "It is now settled law that *so long as the state does not interfere the rates agreed upon between the cities and the street railway companies in the franchise ordinance are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them.*"

Similarly in *Traverse City* v. *Michigan Railroad Commission*, 202 Mich. 575, 168 N. W. 481, the Court said:

> "This subject will be found to have been so exhaustively discussed in its various aspects and the applicable rule so plainly declared in the above cases and those cited in them that it is sufficient here to state we need not go to the extent of many of those decisions to determine in the instant case that Traverse City *was not given by its charter the power to regulate the rates* to be charged by telephone companies, that the franchise contract upon which it relies was not permissive, and, *though binding between the parties to it in the absence of governmental interposition*, is to be construed as having been entered into with reference to the *right* and *power* of the government to assert and exercise its inherent paramount authority."

This Also is the Law of New York State.

This question has been several times decided by the Courts of New York State and it has been held that where the public service corporation has entered into a contract with the municipality concerning rates, *although not authorized by the Legislature*, the corporation will be estopped from questioning the validity of such stipula-

tions, notwithstanding that *the Commission* would have power and was under the duty to revise the contract rate.

In *People ex rel. New York, Westchester & Boston Ry. Co. v. Public Service Commission*, 193 App. Div. 445 (*affirmed* 230 N. Y. 604), it was held that the City of New York, *in the absence of legislative authority to that effect*, had no power to contract with the relator, a railroad corporation (not a *street* railroad corporation) with respect to the rate of fare to be charged within the city, which rate was different from the rate expressly established for such railroads by Section 57 of the Railroad Law; and that, therefore, although *the Commission had power* to increase the rate of fare contained in a franchise *thus granted without legislative authority*, the corporation *could not do so* for the reason that it was bound by the franchise received and accepted by it. The Court said at pages 453 and 454:

> "On the contrary it (the corporation) formally accepted all the terms and conditions of the ordinance, and down to the present time has acquiesced therein, and doubtless *it should not now be heard in its own right, to question the validity of the provisions of the ordinance as binding it until it is relieved therefrom.* (*Rochester Telephone Co. v. Ross*, 125 App. Div., 76; affd., 195 N. Y., 429; *Pond v. New Rochelle Water Co.*, 183 *id.*, 330; *City of Buffalo v. Frontier Telephone Co.*, 203 *id.*, 589). It does not follow, however, that *the Legislature could not itself change the rate of fare so prescribed by the ordinance or could not authorize the Public Service Commission, acting for it, so to do.* (*People ex rel. Village of S. Glens Falls v. P. S. Com.*, *supra*, 223, 226, 227.) If, as we must assume, it is of importance to the public that this service be maintained, the point presented is *not whether the relator can be heard to question the provisions of the grant but whether they are beyond the control of the Legislature with respect to the rate of fare.*"

In *City of Buffalo v. Frontier Telephone Co.*, 203 N. Y. 589, a similar situation was presented by the action of the Telephone Company in challenging the validity of conditions upon which a franchise had been granted and

accepted by it. The unanimous Court in a very succinct opinion said:

> "The defendant having applied for and voluntarily entered into the agreement with the city *is not in a position to challenge its validity.*"

In *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, the Court, specifically limiting its own decision, said:

> "Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at nought. *The state through its delegate, the commission, would lower the charges if too high. It would raise them if too low.* * * * A superintending agency of government had taken the matter in hand."

And finally the Court said:

> "In deciding this case we put our ruling upon the *single* ground that the franchise contract of October, 1912, *was subject to the statute* and by the statute *may now be changed.*"

Since, therefore, the State, acting through the Commission, has never exercised its legislative power to increase the rate, the contracts remained, and are now *binding on the parties.*

IV.

The District Court Failed to Distinguish between a Contract that is Void and a Contract that is Subject to Modification under the Regulatory Power of the State. Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, and San Antonio v. San Antonio Public Service Commission, 255 U. S. 547, are for that Reason Inapplicable.

This question, in certain of its aspects, has been discussed in the previous Division of this brief and is, in fact, completely covered by the opinion of this Court in the *Henderson Water Co. case*. The following considerations may, however, be pertinent:

The fundamental error in the opinion of the District Court lies in its conclusion that because contracts are subject to modification by the State, they are not enforceable *as between the parties*. A corollary and a similarly erroneous conclusion is the statement of the District Court that such contracts to be binding *on the parties* must be entered into pursuant to statutory authority authorizing *the suspension of the police power* over the rate of fare. The District Court did not seem to recognize that it does not militate against the enforceability of a contract that its terms *may be modified by the sovereign power of the State*, and that if the State has not acted the question of whether or not the State, in the exercise of its police power, may reduce or increase the rate, is entirely different from the question of whether *the parties* may escape the obligations of the contract *in the absence of action by the State*. This conclusion, erroneous as we believe, is thus expressed in the opinion of the Court below (Record, page 1990):

> "The guarantee of due process of the Fourteenth Amendment protects the right of a utility to a fair return. There is but *one* limitation upon the right, namely, that it has not been contracted away *pursuant to clear legislative authority to suspend the police power over rates*."

This sentence from the opinion of the District Court shows to what extent it confused the effect of such a contract *on the parties* and its effect on the *power of the State*. The *Palatka case*, the *Opelika case* and particularly the *Henderson Water Co. case* suffice to show that this statement of the District Court does not correctly state the law. In all those cases it was directly held that despite the fact that the *police power over rates had* not *been suspended as against the State*, the utilities were nevertheless, on account of their contracts with municipalities, not entitled to "compensatory" rates.

It should be clearly observed that the District Court has not held, nor could it conceivably have held, that the Contracts here are void. It has held that the rate fixed by the Contract was (Record, page 1990)

> "*subject* to the regulatory law"

and that, accordingly, when the contractual rate (Record, page 1990)

> "*became* unjust and unreasonable *it was subject* to the Commission's regulation."

In other words, that the Contracts, although valid, "*became*" *subject* to the regulatory power and duty of the Commission when the stipulated rate of fare "became" non-compensatory. It would, of course, have been impossible to hold that the Contracts here were void since the Legislature had expressly authorized their execution, *even though we assume here that the Contracts thus authorized were subject to revision by the Commission under the Public Service Commission Law.*

The case at bar presents an entirely different situation from that presented in *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, and *San Antonio v. San Antonio Public Service Commission*, 255 U. S. 547, both of which are referred to in the opinion of the District Court.

In the first of these cases the City of Chariton had entered into a contract concerning the rate to be charged for electricity and gas by the Southern Iowa Electric

Company. The statutes of Iowa, however, not only did not authorize such a contract, but *provided that no such contract should be made.* These statutes after vesting regulatory power over utility corporations *in the City* provided that

> "these (regulatory) powers *shall not be abridged by ordinance, resolution or contract.*"

The City of Chariton was thus *expressly prohibited* by statute from making any contract limiting its own regulatory power and manifestly *any contract so made was void.* This Court quoted with approval decisions of the Iowa courts as follows:

> "That statute in positive terms *forbids* any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. *No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates.* As to corporations named in that statute we have held repeatedly that there can be no contract ing that rates fixed for service shall not be changed."

In conclusion this Court, at page 546, said:

> "The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract."

Similarly in *San Antonio* v. *San Antonio Public Service Company* the contract related to the rates to be charged by a street railway company and was made in direct violation of the Texas Constitution which provided that

> "no irrevocable or uncontrollable grant of special privileges or immunities *shall be made.*"

It was held that in view of this prohibition rendering all such contracts void the ordinance in question should be construed as of a *regulatory* rather than of a *contractual* character, particularly since the City itself in previous litigation with the Traction Company (*San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304) had successfully so contended. This Court said (page 555):

> "We think it is equally clear that, as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.
>
> Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not and could not be, we are of opinion is the necessary result of the provision of § 17, Article 1, of the state constitution, existing in 1899, *prohibiting* any 'irrevocable or controllable grant of special privilege,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the *Altgelt Case*, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

The Statute of Iowa in the one case and the Constitution of Texas in the other directly operated *to prohibit and to invalidate* any contract concerning the rate of fare. Both cases differ in this respect from the later case of *Opelika* v. *Opelika Sewer Co.* (*supra*), where the Constitution of Alabama provided that

> "Every grant of a franchise, privilege or immunity *shall forever remain subject to revocation, alteration or amendment.*"

and where the contract was sustained as binding *between the parties* even though *subject to revocation or alteration by the State*. The distinction was so clearly pointed out by this Court in the *Opelika case* that we venture again to repeat its language:

> "No doubt it is true, also, that the Legislature could not make such a grant indirectly by giving power to a City to make it. *But we see no reason to doubt that the Legislature, without impairing its power to revoke, may give a City power to make a contract from which the City of its own motion may not recede. The City has not attempted to recede from it.*"

The contracts thus *prohibited in the Chariton case and in the San Antonio case were expressly authorized here by the Rapid Transit Act*, even if it be assumed that those Contracts are *subject* to regulation under the Public Service Commission Law or that the rate regulating provisions of that Law were "read into the Contract", entering "by implication into their terms" (*Peo. ex rel. City of New York* v. *Nixon*, 229 N. Y. 356). In point of fact this is the construction placed thereon by the plaintiff itself. Referring to the Elevated Certificate it is stated in the Complaint (Record, page 37):

> "Fare Provisions in Elevated Railroad Extension Certificate *Subject to Regulatory Authority*"

With respect to Contract 3 it is alleged (Record, page 51):

> "Fare Provisions in Rapid Transit Contracts *Subject to Regulatory Authority*"

It is one thing to say that *no contract* with respect to rates shall be made (*Southern Iowa Electric Co.* v. *Chariton*, supra; *San Antonio* v. *San Antonio Public Service Commission*, supra) and that any such contract *is illegal*; it is another and a different thing to say that contracts concerning rates *may* be made, but that such contracts shall be subject to revision by the State (*Opelika* v. *Opelika Sewer Co.*, supra; *Henderson Water Co.* v. *Corporation Commission*, supra; *Southern Utilities Co.* v. *Palatka*,

supra; *Manitowoc* v. *Manitowoc & Northern Traction Co.*, supra; *Salt Lake City* et al. *v. Utah Light & Traction Co.*, supra).

The distinction we draw between the *Chariton* and *San Antonio* cases and the present case finds confirmation in the opinion of the Supreme Court of Florida in the *Southern Utilities Co.* case, 86 Fla. 583. Distinguishing those cases the Court said:

> "There is in this State no provision of controlling law, expressly forbidding irrevocable contracts or other abridgements of the police power as is prescribed in the States of Iowa, Texas, Louisiana and other states as shown by the authorities above cited."

In the *Admiral Realty Company case*, supra, in which *these particular Contracts* were under consideration, the Court of Appeals, conclusively sustained *the fare provisions of the Contracts even if it be assumed that the provisions thus sustained are subject to revision* by the Commission.

PART II.

JURISDICTION OF THE COMMISSION.

We now approach the question which, it is submitted, this Court should not be required to decide, *i. e.* whether under the Statutes of New York State and the decisions of its Courts applicable thereto the fare provisions of Contracts authorized to be made by the Rapid Transit Act are subject to alteration under the rate-regulating powers delegated to the Commission by the Public Service Commission Law.

I.

The Principle of Strict Construction Relied on by the District Court does not Apply here. Every Presumption is Against the Jurisdiction of the Commission.

The District Court relied heavily upon the rule of construction which has frequently been stated by this Court, that the *suspension or alienation* of the police power of the State over rates must be strictly construed and that nothing except clear language will suffice to *divest the State* of its police power over rates. The District Court said (Record, page 1989):

> "The rule is well established that *the renunciation of a sovereign right of this character* must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

It was principally upon this theory that the District Court held that because the Public Service Commission Law contained no affirmative provision *excluding* these Rapid Transit Contracts from the operation of that Law, they must be deemed to be *included*. It said (Record, pages 1982-1983):

> "We find nothing in the amendment of the Rapid Transit Act in 1912 which *excludes* the plaintiff from the application of the regulatory plan."

And again (Record, page 1983):

> "An intention of the parties that the rates then in question should be subject to modification under the Public Service Commissions Law *was not affirmatively expressed* * * *. If these regulatory powers of the Public Service Commission were *not intended to apply* to the contractual rates of the rapid transit railways, express provision to that effect would be expected."

These quotations from the opinion of the District Court show to what extent it misconceived the question here presented, which is a question of *statutory construction*. That question is, whether the Legislature *has delegated to the Transit Commission* the power to modify contracts

made under specific legislative authority. We are not concerned in that connection with the inquiry as to whether or not those contracts are still subject to legislative control. We are concerned only with the question whether, in direct contradiction to the Rapid Transit Act and other pertinent statutory provisions the Legislature *can be presumed to have intended to delegate to the Commission power* to demolish the very contracts that were constructed with legislative authority. In order to answer that question this Court must determine, *not what the Legislature might do, but what it has done.*

The rule of construction applicable to such a situation is precisely the *converse* of the rule applicable where the question is whether the Legislature has alienated its police power over rates *beyond its own power ever to enact legislation with respect thereto.* This was the controlling consideration in the *Quinby case* (soon to be more fully considered), where it was held that the language of Section 49 was not sufficiently "clear and definite" to require the *inclusion* of contracts executed *previous* to the enactment of the Law. The pertinent principle of construction was thus expressed by the Court:

> "It is, however, *unnecessary and, therefore, improper to decide at this time what the limits of legislative power are in this connection.* The delegation of legislative power to commissions and other institutions, officers and boards *need not be assumed if the general words from which such delegation may be inferred are not reasonably so construed. In the absence of clear and definite language conferring without ambiguity jurisdiction* upon the Public Service Commission to increase rates of fare agreed upon by the street railroad and the local authorities *we should not unnecessarily hold that the Legislature has intended to delegate any of its powers in the matter, whatever its powers may be.*"

There was *doubt* in the mind of the Court as to whether the power to modify the Contract there was delegated to the Commission. That was enough. The language of the Statute, as the Court observed, in its opinion and again on re-argument was not sufficiently "*clear and*

definite" and, therefore, *"it would not be assumed* that the Legislature had authorized the Public Service Commission" to revise the rate.

To the same effect is

> *People ex rel. N. Y., etc., R. R. Co.* v. *Wilcox*, 200 N. Y. 423.

The same principle has been stated and applied by this Court. In *Silver* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, this Court, holding that the power there attempted to be exercised by the Commission did not exist, at page 194, said:

> "The commission, as an extraordinary tribunal of the State, must have the power herein exercised conferred by a statute *in language free from doubt. The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction.*"

These considerations assume special importance here because, as we have shown, the District Court has held that since the Legislature did not *expressly exclude* Rapid Transit rates from the operation of the Public Service Commission Law they must be deemed to be *included*. The District Court further said (Record, page 1985):

> "It would have been an easy matter for the Legislature to have written into that Act a statement *exempting* the Rapid Transit rates from the operation of the Public Service Commission Law. *It refrained from doing so* either by word or fair implication."

It is a fair answer to this suggestion that it would have been quite as easy for the Legislature to have "written into that Act" a statement *subjecting* Rapid Transit rates to the Public Service Commission Law, but that *the Legislature "refrained* from doing so." On the contrary, at the very moment that it enacted the Public Service Commission Law *it expressly preserved* unimpaired *"all* the powers and duties" of the former Board of Rapid Transit Railroad Commissioners which were transferred

to the Commission "*in addition*" to its regulatory authority.

Whenever the Legislature has intended to *subject* rates to regulation under the Public Service Commission Law, it has found no difficulty in saying so. In 1910 (Chapter 49 of the Laws of 1910), three years after the enactment of the Public Service Commission Law and two years before the amendment of 1912 to the Rapid Transit Act, the Legislature amended the Railroad Law by *expressly subjecting statutory rates* on Railroads (Section 57), on Street *Surface* Railroads (Section 181) and on Rapid Transit Railroads, *other* than in cities of over one million inhabitants (Section 229) to the operation of the Public Service Commission Law. Although *at the same session* the Legislature amended in immaterial respects Section 27 of the Rapid Transit Act (Chapter 504 of the Laws of 1910) it carefully *refrained* from introducing into that Section any amendment similar to the amendments introduced into the Railroad Law which subjected *statutory* rates to the jurisdiction of the Commission. The action of the Legislature in thus *subjecting these statutory rates on Railroads, Street Surface Railroads and Rapid Transit Railroads in cities of less than one million inhabitants to the jurisdiction of the Commission and in refraining from taking similar action with respect to contractual rates of fare authorized by the Rapid Transit Act* cannot be accounted for otherwise than that the Legislature intended that such *contractual* rates should not be subject to regulation by the Commission.

Therefore, if doubt existed concerning the power of the Commission to regulate rates established by the Contracts the Commission was *required* to hold, and it is submitted that this Court should hold, that the power did not and does not, exist by implication.

II.

There is a Fundamental Distinction between Rate Contracts Executed without Legislative Authority and Rate Contracts which the Legislature has Expressly Authorized. The Legislature cannot be Presumed to Have Excluded Contracts which it had not Authorized, or to have Included, in the Operation of a General Regulatory Law, Contracts which it had Expressly Authorized by Legislation.

There is an obvious distinction between rate contracts executed by shippers with carriers or by carriers with municipalities *with State authority* and such contracts, executed *without* State sanction, to which, for convenience, we will refer here as "private" contracts. To the latter class of contracts the language of this Court in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, is applicable:

> "One whose rights, such as they are, are subject to state restriction *cannot remove them from the power of the state* by making a contract about them. The contract will carry with it the infirmity of the subject matter."

To the same effect are:

Louisville & Nashville R. R. v. *Mottley*, 219 U. S. 467;

Producers Transportation Co. v. *R. R. Commission of California*, 251 U. S. 228;

Union Dry Goods Co. v. *Georgia Public Service Commission*, 248 U. S. 372.

When considering the latter class of contracts there is no reason to suppose that the Legislature excluded them from the operation of general Laws relating to the subject of rate making, over which the Legislature, in the absence of contract, has, of course, exclusive control. With respect to the former class, however, there are convincing reasons for assuming that the Legislature would not intend to interfere with rates specified in contracts *which it*

had authorized and these reasons become conclusive where the enabling statute is a statute of a *special* nature and is *later*, in point of time, than the general Law.

The difference between the conditions surrounding the execution of private contracts and contracts authorized by legislation indicates a further reason for the distinction. Private parties, whether corporate, municipal or otherwise, frequently enter into contracts with respect to Railroad, Gas or other Utility rates without attempting to procure the sanction, and *without the knowledge*, of the Legislature. Such contracts, of course, are subject to the police power of the Legislature over rates and they may also, whether made before or after the enactment of a regulatory Law, be subjected to the jurisdiction of a Commission acting for the State. But where the parties, contemplating such a contract appeal to the Legislature for special authorization to contract and the Legislature, in the exercise of its powers, confers that authority by Statute, it is inconceivable, and it would be anomalous, if the authority to make a binding contract thus conferred should be held to be subject to the regulatory law.

We fully concur in the following language of Cardozo, J., in *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, applicable to *private* contracts:

> "*Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is.* The statute which clothed the commission with jurisdiction to increase charges, if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to 'transform a consent that was qualified into one that is absolute' (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. *This is merely to give effect to the settled rule that contracts are made in submission to existing legislation.*"

This language is apt and logical when applied to the relation between a *statute* and a *private* contract. It is

merely an expression of the principle that where private contracts come into collision with the public interest, the private contract must give way. But the conflict here is not between a private contract and the Public Service Commisison Law of 1907; it is between the *general* regulatory provisions of the Public Service Commission Law *of 1907* and the *special* provisions of the Rapid Transit Act *of 1912* by which the Contracts were authorized to be made. If it be true that the provisions of the Public Service Commission Law were "written into" the Contracts, it is likewise true that the provisions of the Rapid Transit Act were *to the same extent* "written into" them. And, when those provisions are examined, it is found that the Legislature expressly authorized the Contracts to be made, which is equivalent to declaring that they should be *binding* during the contract term, unless the word "contract" is without legal significance.

This simple distinction differentiates all the cases relied on by the District Court to sustain its conclusions. It is a distinction which has been established by this Court as the test to determine whether or not the rate contract is entitled to protection under Section 10 of Article I of the Constitution of the United States.

Cleveland v. *Cleveland City Railway Co.*, 194 U. S. 517;

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 211 U. S. 265;

Vicksburg v. *Vicksburg Water Works Co.*, 206 U. S. 496;

Detroit v. *Detroit Citizens Railway Co.*, 184 U. S. 368;

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S. 558;

Superior Water, Light & Power Co. v. *City of Superior*, 263 U. S. 125;

St. Cloud Public Service Co. v. *City of St. Cloud*, 265 U. S. 352;

Georgia R. & Power Co. v. *Decatur*, 262 U. S. 432;

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650.

The distinction between the right of a *municipality* in the absence of legislative authorization to make a binding contract with respect to rates, and its right to do so with State authority, was stated in the decision of this Court in *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, cited by the District Court, where Mr. Justice Moody at page 273 said:

> "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. *No other body than the supreme legislative* (in this case, the legislature of the State) *has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature.* The general powers of a *municipality*, or of any other political subdivision of the State are *not* sufficient."

It is true that we are not at this moment concerned with the question whether the rate regulating power of the Legislature *has been suspended* by the Contracts here, but in holding, as it has uniformly held, that those powers *are suspended where the Contract has been authorized*, this Court proceeded infinitely *further* than is necessary in the case at bar. It held in such cases that where the contract had been authorized by legislation, the Legislature *could not* thereafter regulate the rate. Here it is only necessary to consider whether, as a question of *statutory construction*, it should be presumed that the Legislature intended to do that which in the cases above referred to, it was decided that the Legislature *could not do*.

III.

By the Rapid Transit Act the State of New York Delegated to the Parties the Power to Contract Concerning the Rate of Fare both on the Subway and Elevated Lines.

We thus approach the question whether the Legislature here authorized the parties to make Contracts for a five-cent fare, on the Subways, in Contract 3, and on the Elevated Lines in the Certificate, and in this connection, as a preliminary consideration, the nature of these Contracts should be observed.

Nature of the Contracts.

The character of these Contracts and the direct participation of the State in their execution is evident from the fact that they are required to be executed, not *directly* between the Interborough and the City of New York, but between the Interborough and the Commission whose action, although taken on behalf of the City, was that of State officials (*Litchfield Construction Co.* v. *City of New York*, 244 N. Y. 251; *Gubner* v. *McClellan*, 130 App. Div. 716). The only limitation upon the action of the Commission is that it shall receive the *approval* of the Board of Estimate and Apportionment. If these Contracts had not been recognized as Contracts in which the Legislature and the State were deeply concerned it would have been a simple matter to have vested the authority *directly* in the City and the Company.

The contracts that resulted, therefore, from the joint action of the *contract-making State body*, acting with the approval of the City, were Contracts authorized, and intended to be binding, *upon both*.

The Five-cent Fare Provisions in the Certificate and in Contract 3 Were Authorized by the Rapid Transit Act.

The pertinent provisions of Section 24 of the Rapid Transit Act relating to the Certificate will be found at pages 31 and 32, and those of Section 27 with respect to Contract 3 at pages 30, 31 and 32 of this brief.

Concerning the Certificate.

The District Court has held (Record, page 1977) that

> "It (the Rapid Transit Act) did not authorize the Commission to condition an Extension Certificate upon a stipulation as to fare. It designates the subjects to be embraced in the Certificate *but without reference to fare provisions.*"

The District Court seems to have concluded that the authority contained in Section 24 was insufficient because it does not specifically refer to or use the particular word "fare," regardless of how broad the authorization may be. We insist that there is nothing magical in the use of this or any other word and that no particular form of words or formula is necessary if the language used *is broad enough to include fares.* The greater must necessarily include the less. If Section 24 be read in the light of this simple principle of construction it will be found that a fare provision is plainly authorized by the broad grant of power contained in Section 24. That Section provides in part:

> "The commission *shall*, with like approval (of the Board of Estimate and Apportionment) *fix and determine* the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation *and such other terms, conditions and requirements as to the said boards may appear just and proper.*"

Then follow provisions (subdivision 2) requiring the preparation of a Certificate "setting forth in detail the action by the Commission" "and the terms, conditions and

requirements *aforesaid*" which, it is provided, shall be delivered only upon receipt by the Commission of "a written acceptance of *said terms, conditions and requirements*" executed by the corporation to which it is delivered. By subdivision 4 the Certificate thus prepared and delivered is declared "*to constitute a contract* between the said City and said person, firm or corporation *according to the terms* of the said Certificate."

Then follows a provision that is highly significant in determining the intent of the Legislature:

> "The terms of such contract may from time to time *with the consent of such person, firm or corporation* be modified by the Commission."

If the Legislature did not, by these provisions, "authorize the Commission to condition an Extension Certificate upon a stipulation as to fare," then language is incapable of doing so because authority could not have been delegated in more comprehensive terms. Instead of determining for itself all the "*other* terms, conditions and requirements" upon which a Certificate might be granted, the Legislature delegated the decision of that question to the Commission *with full authority to act*. It is true that the Legislature might have provided what the rate of fare or what the "*other* terms, conditions and requirements" should be. Instead of doing so the Legislature selected a simpler, more comprehensive and, it seems to us, a more appropriate method by delegating to the Commission authority to condition its Certificate upon

> "such *other* terms, conditions and requirements *as to the said boards* [Commission] may appear just and proper."

In doing this the Legislature recognized that in addition to the provisions required to be inserted in the Extension Certificate by Section 24, *there would be "other terms, conditions and requirements" than those enumerated in the Statute*. It declared in language, apt and comprehensive, that these should be first "*determined*" by the Commission, then "*set forth in detail*" in its Certificate and that, when finally accepted, they should "*constitute a contract*" between the parties.

In *Cleveland* v. *Cleveland City Railway Company*, 194 U. S. 517, the ordinance expressing the contract between the City of Cleveland and the utility corporation had been passed pursuant to a statute of Ohio providing as follows:

> "No corporation, individual or individuals shall perform any work in the construction of a street railroad until application for leave is made to the Council in writing and the Council by ordinance shall have granted permission and prescribed *the terms and conditions upon*, and the manner in which, the road shall be constructed and operated."

This was held to authorize a contract between the City and the utility corporation concerning the rate of fare to be charged, inviolable against subsequent alteration. This Court said (pages 533-534):

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies *in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.*
>
> That in passing ordinances, based upon the grant of power referred to, the municipal council of Cleveland *was exercising a portion of the authority of the State, as an agency of the State, cannot in reason be disputed.* If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts."

An identical provision was sustained by this Court in *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399.

In *Omaha Water Co.* v. *City of Omaha*, 147 Fed. 1, the statute empowered the City of Omaha to contract for the

construction and maintenance of water works *"on such terms and under such regulations as may be agreed on."* The Circuit Court of Appeals for the Eighth Circuit (Sanborn, Hook and Adams, *JJ.*) held that the statute authorized the city to enter into a contract for the construction of water works *and to provide for the rates at which the contractor should furnish water to private consumers.* Said the Court:

> "Did the Legislature of Nebraska empower the city of Omaha to agree upon unalterable water rates during the term of the contract in hand? Did the city agree that it would not reduce these rates below those specified in the ordinance? We turn back to the act of 1879 and to the ordinance contract of 1880 in the light of the rules and decisions to which we have adverted for the answers to these questions. Authority had already been granted to the city to build its waterworks and to regulate the use of water derived therefrom when the act of 1879 was passed, but no waterworks had been constructed. The state then granted to the city the additional power to contract with third parties for their construction and operation *'on such terms and under such regulations as may be agreed on.'* Are the rates under which water is to be furnished to private consumers 'terms and regulations' upon which parties may agree that waterworks may be constructed and operated? The Supreme Court was of the opinion that they were, for it held in the Cleveland case that a city was empowered to agree with a railway company upon rates of fare for passengers under legislative authority to fix the 'terms and conditions' for the consolidation of corporations. The city of Omaha evidently thought so, for by the ordinance of 1880 it made specified water rates one of the terms and regulations of the contract which it offered to the lowest bidder and which it required him to accept. The main purpose of city waterworks is the revenue derived from private consumers of water. The rates which they pay absolutely determine the financial success or failure of a city water company's enterprise. The term or regulation in a contract for the construction and operation of waterworks which more than any other conditions the nature and the prospect of the undertaking is that which fixes the rates which the owner may

> collect of private consumers. These are matters of common knowledge. The members of the Legislature could not have been ignorant of them when they granted to this city the power to agree upon terms and regulations upon which the works should be built and operated, and it is incredible that they intended to except from this general grant the authority to agree upon the cardinal term which alone conditions the success of the entire undertaking. They made no such exception and that fact raises a conclusive presumption that they intended to make none, and it is not the province of the courts to do so. *Madden* v. *Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Wrightman* v. *Boone County*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Union Central Life Ins. Co.* v. *Champlin*, 54 C. C. A. 208, 210, 116 Fed. 858, 860. *The conclusion is unavoidable that by its grant of power to agree upon the terms and regulations under which the waterworks should be constructed and operated the Legislature intended to grant, and it did grant to the city of Omaha, by apt words and in unmistakable terms, the power to make an unalterable contract regarding the water rates which the contractor might collect from private consumers for a reasonable term of years.*"

Unless, therefore, words are incapable of conferring such authority, Section 24 vested in the Commission full power to impose "*such other* terms, conditions and requirements" as *the Commission* might deem "just and proper." By the express language of the Statute this was a question which was committed *to the judgment of the Commission directly by the Legislature*. That the Legislature had the power to do this will not be denied and that, having done so, the Commission might exercise the authority thus conferred by delivering its Certificate upon such conditions as to fare as might "appear just and proper" *to the Commission* is equally obvious.

The District Court, therefore, in holding that this Section

> "did not authorize the Commission to condition an Extension Certificate upon a stipulation as to fare"

ignored the plain language of the Statute.

Concerning Contract 3.

The same argument is applicable to the provisions of Section 27 under which Contract 3 was executed and which in part provides

> "Every such contract *shall contain such terms and conditions as to the rates of fare to be charged* and the character of services to be furnished and otherwise *as said Commission shall deem to be best suited to the public interests.*"

Notwithstanding these provisions of Section 27, and others soon to be referred to, the District Court has held that the Commission had no authority to execute contracts providing for an inflexible five-cent fare, but that this fare provision

> "*did not purport* to grant unqualified authority to contract for a fixed fare for the entire life of the contract."

If Section 27 did not accomplish precisely what the District Court has held that it did not do, then we do not know what form or words or formula is necessary. The "terms and conditions as to the rates of fare to be charged" was *required* by Section 27 to be contained in the lease and it was provided that *the Commission* should exercise *unlimited* discretion with respect thereto, for these were required to be such "*as said Commission* shall deem to be best suited to the public interests." If the Legislature did not intend by these provisions that the Contract should contain a fare stipulation and that it should be such as the Commission and the Company might agree upon and the City approve, then there is no meaning in words.

In the exercise of that discretion the Commission might have concluded to execute a contract in which the fare was based upon a sliding scale or by which the fare was subject to readjustment at stated intervals or it might, as it did in Contract 3, *express its conviction that the public interest was best served by a fixed and unchangeable rate of fare.*

IV.

The conclusion of the District Court that Contract 3 and the Certificate are Subject to the Regulatory Powers of the Commission Renders Meaningless and Self-destructive the Provisions of the Rapid Transit Act by which these Contracts were Authorized. On account of the Special Provisions of the Rapid Transit Act the Fare Stipulations in these Contracts are Withdrawn from the Rate-regulatory Powers of the Commission.

We insist that if the Commission had the power to "*contract*" concerning the rate of fare on the Subways and on the Elevated Lines, it must follow that the Transit Commission had no regulatory power to revise the terms of a "contract" so authorized, whose very purpose was to establish arrangements that would not be susceptible of change.

In considering this question it is evident that the *contract* rate and a *reasonable* rate, as defined by the Public Service Commissions Law, must rarely, if ever, coincide. A municipality may, for a variety of reasons, be willing to allow a higher rate of fare than legal principles might justify, or the carrier may be willing, for good cause, such as the development of its territory, the attractions of cheap transportation, etc., for a limited period, to accept a low return, or no return whatever on its investment, on account of the prospect of generous profits in the future. There are, moreover, manifest advantages in a fixed rate of fare that will not fluctuate from year to year with alternate periods of depression and prosperity and with the attending rise and fall of labor or materials upon which the value of the property depends, and on which (as the plaintiff contends) depends also the determination of a fair return.

Since, therefore, a "reasonable" rate of fare as defined by the Public Service Commissions Law will rarely, if

ever, coincide with a "contractual" rate as determined by the parties, it follows that the contract made by legislative authority must be supreme, because if not supreme, the authority to contract becomes meaningless and nugatory.

The conclusion of the District Court that these contracts are subject to the regulatory powers of the Transit Commission and that the rate must be a *reasonable* rate notwithstanding the *contract* rate, reduces itself to the proposition that exactly the same consequences follow where there exists a contract authorized by statute as where there is no contract at all. Concededly, *if no contract exists* concerning rates of fare, the rate, by operation of law, is required to be reasonable, and yet it is insisted that precisely the same consequences follow where *there exists a contract* with respect to fares made under express legislative sanction. It is idle to assert as does the District Court that

> "such a construction takes no undue liberty with the fare provision of the Transit Act,"

because the fare provision becomes meaningless, superfluous and self-destructive if it means no more than that the contract rate will only be enforceable if it is of such a character that it would be imposed in any event by the Public Service Commissions Law. The statute should not be construed merely to authorize that to be done that would have been done without its enactment but must in reason be held to have empowered the parties to accomplish by contract a result *not otherwise obtainable* under the Public Service Commissions Law. The opinion of the District Court amounts to this: that where there is *no* contract a reasonable rate must be fixed under the Public Service Commissions Law and that where there *is* a contract fixing rates, although made under express statutory authority, the rate fixed must *also* be reasonable.

To hold, therefore, that the contracts concerning rates of fare on the Subway and Elevated Lines did not protect both parties against an increase or reduction in the rate of fare, renders those provisions of the Rapid Transit

Act authorizing such contracts to be made meaningless, if not ridiculous. The very purpose of the authority thus delegated to the parties was to permit them to accomplish a result *that could not be secured except by contract* and that might *not* be "consistent with the limitations and provisions of the Public Service Commissions Law." To hold otherwise would be equivalent to deciding that the power to contract concerning rates of fare expressly granted by the Rapid Transit Act was at one and the same instant both given and denied.

It does not answer this argument to say, as does the District Court, that the contractual authority was

> "confined to the establishing of *temporary* rates and should not foreclose either party if and when it became unjust and unreasonable either because it was excessive or non-compensatory to apply for a change."

If it be true that the parties were limited to establishing "temporary rates" (a limitation not to be found anywhere in the Rapid Transit Act) not foreclosing either party if the rate became excessive or non-compensatory, it must also follow that the parties were limited to establishing a "temporary rate" that would be a "reasonable rate" because the rate, if unreasonable, even though temporary, would be in defiance of the Public Service Commissions Law. This means that the very moment the contracts were executed they became subject to modification at the hands of the Commission and that the Commission was immediately required to increase the five-cent fare, if too low, or to reduce it, if excessive.

If, therefore, the conclusion of the District Court is correct and if the parties were limited to establishing a rate by contract which without contract was established by operation of law, what was the meaning or the purpose or significance of the provisions authorizing the parties to *contract* concerning the rate of fare? These provisions must have been intended to authorize a contract *not* consistent or that might become *inconsistent* with the Public Service Commissions Law and whose very purpose would be to resist modification from any source.

If the statutory authority was limited to the execution of a contract that

> "must be in harmony and not in defiance of the standard of public interest which the Legislature had itself declared and established."

as the District Court has held, it would have rendered superfluous any contract on that subject and would result in delegating with one hand and retracting with the other the power to contract—it would amount to holding that although the parties were authorized to make a contract concerning the rate of fare its effect was frustrated and its validity denied the very moment it was made.

This very question, which arises in every case where any public body has *both* contractual and regulatory power, was presented and decided by this Court in *Public Service Co. v. St. Cloud*, 265 U. S. 352. There the power of the City of St. Cloud to contract for the rate at which fuel gas should be furnished was based on provisions in the City charter authorizing the City to contract but *further* providing

> "*that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned.*"

In holding that these provisions gave the City power to contract for an inflexible rate to be charged for fuel gas during a thirty-year period this Court by Mr. Justice Sanford said:

> "*We do not think that this contractual power was limited by the proviso that the council should have the right to 'regulate and prescribe' the rates and charges of the companies to which it might grant the right of constructing such works.* It is true, that, *standing alone*, this proviso, in the absence of any state decision to the contrary, would, under the construction given similar language in *Home Telephone Co. v. Los Angeles*, *supra*, p. 274, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no

other provision of the charter authorizing the city to contract as to rates. And in the present case, *as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision;* that is to say, we think that *the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rates in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding.*"

The case at bar falls directly within this decision. Assuming that the Public Service Commission Law gave the Commission general *regulatory* power even over Rapid Transit rates, the Commission, by Sections 5 and 83 of *that Law*, "*in addition thereto*" was vested with "*all the powers* heretofore (prior to 1907) conferred upon the Board of Rapid Transit Railroad Commissioners" under the Rapid Transit Act. This *specifically included the power to contract for such rates of fare on Rapid Transit Railways as the Commission should deem best suited to the public interest.* Under the *St. Cloud* decision this vested the Commission with power to contract for an unalterable rate of fare on Rapid Transit Lines notwithstanding any *alternative* regulatory power under the general provisions of the Public Service Commission Law. When, therefore, the power to contract, thus expressly preserved and transferred to the Commission in 1907 by the Public Service Commission Law, was exercised, *the regulatory power of the Commission over rates thus contracted for, was suspended.*

The Decision in People ex rel. New York, New Haven & Hartford Railroad Co. v. Wilcox, 200 N. Y. 423, and Other Decisions of the Court of Appeals have Established that Matters Specially Authorized by the Legislature are Withdrawn from the Operation of the Public Service Commission Law.

In the *Wilcox case* the provisions of Section 49 of the Public Service Commission Law authorizing the Commission to "determine" the "safe, adequate and proper regulations, practices, equipment, appliances" on railroads, as well as the provisions of Section 45, which vested the Commission with "general supervision over all common carriers" came into conflict with the provisions of the Greater New York Charter, which authorizes the Board of Health to exercise substantially similar jurisdiction. Notwithstanding that the Public Service Commission Law was a *later* statute, it was held that the Commission ***had no jurisdiction over matters that were subject to the jurisdiction of the Board of Health.*** This decision and the language of the Court of Appeals is so conclusive on this aspect of the case at bar that, rather than to quote isolated passages of that opinion, we respectfully request the Court to examine the full opinion in the reports.

Indeed, the question here presented is not new. In at least two other cases it has been applied by the Court of Appeals of New York State to other provisions of the Public Service Commissions Law and the principle established by those cases is, it is submitted, controlling here.

Village of Fort Edward v. *Hudson Valley Railway Co.*, 192 N. Y. 139.

City of New York v. *Brooklyn City R. R. Co.*, 232 N. Y. 463.

In both these cases the question involved related to Section 53 of the Public Service Commissions Law which provided that no railroad or other common carrier might commence the construction of a railroad or any extension thereof without first securing from the Commission a certificate of "convenience and necessity."

In the *Brooklyn City Railroad case* the City of New York was held to have authority under various statutes of the State of New York enacted in 1896, to operate a railroad over the Brooklyn Bridge and to construct a spur appurtenant thereto. The question was presented whether this right was subject to the requirements of the Public Service Commission Law and whether accordingly it was necessary for the City to secure a certificate of convenience and necessity, precisely as it is claimed here that the right to contract with respect to rates of fare delegated to the parties by the Legislature is subject to the provisions of Section 49 of the Public Service Commissions Law.

The Appellate Division held that it was necessary for the City of New York, before commencing operations, to secure a certificate of convenience and necessity from the Public Service Commission. This decision was *reversed* by the Court of Appeals which held unanimously that the City's authority to construct this railroad *emanated directly from the Legislature* and was, therefore, not subject to the authority of the Public Service Commission. The court said, at page 470:

> "In order to operate the railroad and to construct the necessary trackage, no certificate of public convenience and necessity nor permission of the public service commission is required. * * * *The entire scheme under which the bridge was constructed indicates plainly that the city's authority comes direct from the legislature and not through the public service commission, and that convenience and necessity and permission were all decreed in* 1895 *and* 1896 *by legislative fiat.*"

In conclusion the Court observed:

> "*The public service commission may not veto a statute. It is only a legislative creature.* It 'was not created for the convenience of corporations, but *for the protection of the public.*' (Vann, J., in *Village of Fort Edward* v. *Hudson Valley Ry. Co.*, 192 N. Y. 139, 159.)"

In the *Village of Fort Edward case* a similar question arose. Under Section 12 of the Railroad Law, railroad companies, whose tracks crossed each other, were required

to intersect their tracks for the benefit of the public. This, under Section 53 of the Public Service Commissions Law could, however, only be done by obtaining from the Public Service Commission a certificate of "convenience and necessity." It was held, however, that such a certificate was not required for the reason that the right to make the intersection was expressly authorized by statute which the Public Service Commission had no jurisdiction to set aside. The Court said, at page 148:

> "It would seem, therefore, that *the Legislature by section 12 of the Railroad Law had itself determined the question of convenience and necessity in such cases*, and we have been unable to find any expression in the Public Service Law indicating a legislative intent to repeal this provision of the Railroad Law or to invest the commissioners with the power to supersede it. It will be observed that every clause of section 53 of the statute under review pertains to the procuring of a certificate of public convenience and necessity, and this is as true with reference to the clause under consideration as it is with reference to those which preceded it; for permission to exercise the franchise or rights therein mentioned is only to be granted by the commission after a hearing had and a determination made that such exercise of the franchise or privilege is *necessary or convenient* for the public service.'"

Continuing, the Court observed:

> "We, consequently, conclude that the Public Service Commission is not required to give a certificate of convenience and necessity under Section 53 in this case, and that there is nothing in the provisions of the section that require the commission to determine the point or manner in which the intersection of the defendants' tracks should be made."

It was accordingly held in both the cases above considered that since express provision had been made *by statute* the Public Service Commissions Law did not apply notwithstanding that the Statutes in *both* these cases had antedated the enactment of the Public Service Commission Law.

The Rapid Transit Act, Amended in 1912 to Authorize the Contracts Here and which Deals Specially with the Subject of Rapid Transit in Cities of over One Million Inhabitants, Withdrew those Contracts From the Regulatory Powers of the Commission with Respect to Fare.

The cases which we have considered are applications of the principle of statutory construction that the Legislature will not be deemed to have intended that a statute relating to *a particular and limited subject*, such as rapid transit, should be affected by a statute of a *general* nature where there is inconsistency between the two. This rule is particularly applicable where the statute concerning the particular subject is *later* in point of time than the general statute or has been *amended for a special purpose*, as, it must be conceded, was done here.

Parker v. *Elmira C. & N. R. R. Co.*, 165 N. Y. 274, is singularly in point. There a statute had been enacted in 1872 authorizing the Utica, Ithaca and Elmira Railroad Company to charge a fare of four cents per mile. *Subsequently* the General Railroad Law of 1890 was enacted providing for a legal rate of fare of three cents per mile on all railroads and it was contended that since the State at all times had reserved general authority to regulate rates and since that authority had been exercised by the General Railroad Law of 1890, subsequent to the law of 1872 providing for a four-cent fare, the Utica Railroad Company was limited to a three-cent fare.

The Court held to the contrary, *notwithstanding that the General Railroad Law was enacted after the Law providing for a four-cent fare.* It would be impossible within the limits of this brief to quote the pertinent passages from the opinion of the Court and we must therefore again refer the Court to the opinion of the Court of Appeals in that important case.

Other authorities in New York State to the same effect are:

People ex rel. Leary v. *Knox*, 166 N. Y. 444;
Grimmer v. *Tenement House Department*, 204 N. Y. 370;
Buffalo Cemetery Association v. *City of Buffalo*, 118 N. Y. 61;
Excelsior Petroleum Co. v. *Lacey*, 63 N. Y. 422.

This rule is not limited to "special" or "local" Laws. The rule and the reason for it apply equally to cases where the Legislature by *general* law has singled out a *particular class* of corporations for special treatment.

Matter of Murray Hill Bank, 153 N. Y. 199.

The same rule applies in this Court:

Rodgers v. *United States*, 185 U. S. 83;
Petri v. *Creelman Lumber Co.*, 199 U. S. 487;
Townsend v. *Little*, 109 U. S. 504;
Cook County National Bank v. *United States*, 107 U. S. 445.

V.

The Conditions Under which the Amendments of 1912 were Enacted, Taken in Connection with the Decision of the Court of Appeals in the Admiral Realty Company Case, prove that the Rates Stipulated in the Contracts were not Intended to be Subject to the Public Service Commission Law.

In our Statement of Facts (*ante*, pages 25-34) we have referred so fully to the conditions surrounding the enactment of the Amendments of 1912 and to the facts which show that those Amendments were intended to authorize precisely the Contracts that are now before the Court, that very little need be added here.

On account, however, of the opinion of the District Court on this question, one further important consideration should be referred to. It is suggested by the District Court (Record, page 1985) that because the fare provisions applicable both to Contract 3 and the Certificate were *re-enactments in 1912* of earlier and similar provisions of the Rapid Transit Act their importance may be deprecated and the provisions ignored. Without pausing to analyze the extraordinary conclusion that *later* legislation may be thus subordinated and, in effect, repealed by *earlier* legislation (the Public Service Commission Law of 1907), we will proceed to show that the fare provisions thus *specifically re-enacted* by the Amendments of 1909 and 1912, especially when taken in connection with the *new* provisions then added, were an integral part of this new scheme of legislation.

Previous to 1909 there was no specific legislative authority to the City to lease its lines *except for a fixed rental*. It had received no legislative authority to make a lease under which it would receive, as rental, *an interest in the earnings of the lines*. The Amendments of 1909, which were further extended and amplified in 1912, were, therefore, deemed essential, or at least desirable, to permit the City, to accept *a share of the earnings* (subject to the preferentials) *as rental for its lines* in Contract 3 and *as*

compensation for authorizing the extensions in the Certificate. When, therefore, the Legislature, *after* the enactment of the Public Service Commission Law of 1907, authorized a Contract and Certificate which should provide in each case for a share of the earnings of the lines as rental to the City, its attention was particularly directed to *the question of what the earnings* to be anticipated from the operation of the lines *at a particular rate of fare* would be.

But this is not all. We have previously shown (*ante*, pages 22-24) that the preferential payments in Contract 3 and in the Certificate were conceded by the City in exchange for the single five-cent fare. These preferentials were *for the first time* expressly authorized by the Amendments to Sections 24 and 27 *enacted in 1912* which expressly provide (Section 27) that the Contract may *only* accord these preferentials to the company "*if*" the new lines were operated in conjunction with the existing lines *at a single fare*. It is self-evident, therefore, that the enactment of *these new provisions* together with the *re-enactment* of the earlier provisions of Sections 24 and 27 were intended to permit if indeed they were not intended to require, precisely such Contracts as were then awaiting execution and were subsequently made.

In the Admiral Realty Company Case the Court of Appeals Directly Sustained These Contracts.

We have already shown (*ante*, pages 25-35) the conditions surrounding this important litigation, pending in the Courts of New York State at the time of the enactment of the Amendments of 1912 and that those Amendments were enacted on account of that challenge directed against the validity of *these particular Contracts*.

We need not rely, however, merely upon this. There is another consideration which requires no more than a rational appreciation of the main issue in the *Admiral Realty case to be conclusive*. The preferential payment provisions in the proposed Contracts and the 1912 amendments to the Rapid Transit Act intended to authorize them

were attacked as in violation of the State Constitution which declared that

> "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation." (Art. 8, Sec. 10.)

The arguments of all the parties and their serious consideration and disposition by all the New York courts were predicated on the necessary assumption *that the five cent fare provisions would be in force throughout the forty-nine year period even though it would not yield a reasonable return or any return to the Interborough or the City.* The burden of the argument was to the effect that it was highly improbable that the single five cent fare would ever yield a return sufficient to cover the preferential payments to the Interborough *and leave something to be paid to the City;* that during the first few years of operation it was almost certain to be insufficient; that the city was therefore *"giving"* the Interborough the use of the lines for nothing; and that the City was therefore giving its property to or in aid of a corporation in violation of Article 8, Section 10, of the Constitution of the State. If, as the Interborough now contends, the five cent fare provision was to be effective only so long as it yielded a reasonable return to the City as well as to the Company on the entire investment of both, there would have been no possible basis for that Constitutional objection. The fare would, by Commission regulation, always have to be maintained sufficient to yield a return to all, and the preferential payment provisions would relate merely to the order in which the payments were to be made. Permitting the Interborough to pay its operating expenses before its rent clearly would not be open to the Constitutional objection if enough money was certain to remain to pay the rent as well. There would also have been no real reason for the Interborough's insistence on the preferential payment provisions, nor for the amendment of the Rapid Transit Act made in 1912 to empower the City to agree to those conditions. Yet the Interborough strenuously insisted on them; the Commission and the City reluctantly agreed to them; the Legislature specifically

VI.

Other Considerations which Establish that the Legislature could not have Intended Rapid Transit Contracts to be Subject to the Jurisdiction of the Commission.

Many of these considerations are so fully considered in the Statement of Facts that we will merely refer to the pages where those facts appear.

The Important Amendments of 1921, 1922 and 1923 to the Public Service Commission Law which are not Even Referred to by the District Court.

These are fully set forth *ante* at pages 50 to 55. These highly significant Amendments, to which *the District Court does not even refer*, show:

1. That if it is true, as the Interborough has contended, that the Amendment of 1921 was intended to subject these Contracts to the jurisdiction of the Commission, it must follow that they were not considered by the Legislature to be subject to its jurisdiction *previously* when the Statute stood exactly as it stands *now*.

2. That in order that there might be no question concerning the jurisdiction of the Commission, the Legislature in 1921 inserted the "proviso" of that year, taking effect *on the same day* that the Interborough filed its application for a fare increase. Beyond question the Legislature then, even if not before, expressed its determination *not to permit*, much less to require, these Rapid Transit contract rates to be revised.

3. That in 1923 the Legislature *eliminated* the provision which the Interborough contends was *enacted* to subject these Contracts to the jurisdiction of the Commission, thus restoring Section 49 to the condition previous to 1921, when, as we have shown, the Legislature could not have considered these Contracts to be subject to the jurisdiction of the Commission.

The Memorial to the Legislature of 1925.

This is fully considered at pages 55 to 58. As there pointed out the Memorial was submitted to the Legislature on the theory that jurisdiction of the Commission over these Contract rates *had not existed since the amendment of 1922* and that, accordingly, to secure any change in the Contracts it was necessary that the Legislature should *enact a Statute increasing the rate of fare.* The fact that the Legislature *did not do this* further discloses the legislative intent.

The Approval of the Contracts by the City Required by the Rapid Transit Act, Together With the Amendments of 1925 to the Public Service Commission Law Requiring Similar Approval of Any Modification Thereof, Proves that it Could Not Have Been Intended to Permit the Rate of Fare to be Altered against the Opposition of the Commission and the City.

We have previously shown (*ante*, pages 10-11) how carefully the Legislature provided, by the Amendments of 1906 to the Rapid Transit Act, for the approval by the City of every step surrounding the construction of, and the terms and conditions on which, the municipally owned lines might be leased for private operation. At the same time it required the approval of the City to any Certificate and the terms upon which it might be granted.

It requires no argument to show that the rate of fare was the most material of these (*Detroit* v. *Detroit* v. *Citizens St. Ry. Co.*, 184 U. S. 368; *Minneapolis* v. *Street Railway Co.*, 215 U. S. 417; *Detroit United Ry.* v. *Michigan*, 242 U. S. 238). Since the Legislature thus required the approval of the City *to all the terms, including the rate of fare*, upon which the City-owned lines might be leased *and all the terms* on which any Certificate for extensions might be conditioned, how can the suggestion be entertained that it was intended that *these terms, when thus approved*, could be abrogated by the Commission without the con-

sent of the City, or by the Interborough, against the opposition both of the Commission *and* the City.

This conclusion is confirmed by the Amendment of 1925 (*ante*, page 59) which added Section 112 to the Public Service Commission Law. By that Amendment the Commission *was prohibited*, even in its contractual capacity, from making *any agreement with respect to fare or otherwise* except with the approval of the City of New York. This again constituted explicit recognition by the Legislature of the principle that these Contracts, that could not have been *made* without the approval of the City, should not be *changed* except with the approval of the City similarly secured.

The Amendment of 1909 to (former) Section 7 of the Rapid Transit Act of 1894 which Remained in Effect for Two Years after the Enactment of the Public Service Commission Law in 1907.

These Amendments are referred to *ante*, pages 20 to 22. By the Amendment of 1894 any franchise *privately* to construct and operate a Rapid Transit Railway *was required to contain a provision limiting the rate of fare to five cents* (*ante*, page 8). Notwithstanding the enactment of the Public Service Commission Law in 1907 and notwithstanding that the Legislature during that period *twice amended* the Rapid Transit Act it did not undertake to alter this provision of Section 7 until, by the Amendments of 1909, it *further extended* the powers of the Commission by removing this, the only limitation even with respect to privately constructed Rapid Transit Lines.

It is incredible that the Legislature when it enacted the Public Service Commission Law in 1907 intended that the very provision which, by the Rapid Transit Act, *was required to be inserted in contracts* in order that rates of fare on privately owned rapid transit lines should never, during the period of the contract, exceed five cents, should have intended at the same time, that the contractual limitation thus required to be imposed should be subject to alteration. (*Village of Fort Edward* v. *Hudson Valley Railway Co.*, 192 N. Y. 139, discussed *ante* at pages 162-164.)

We are curious to know what the Appellee's argument would be with respect to a franchise for *private* construction, executed *between 1907 and 1909* and which in compliance with this *mandatory* provision of the Rapid Transit Act *would necessarily have contained a five-cent fare limitation.*

The Consequences of Holding that the Commission was Under the Duty to Revise Rates in Contracts, which it was Its Duty to Enforce, Demonstrates that the Commission Was Not Intended to Exercise such Regulatory Authority over these Contracts.

The Commission has the duty under the Rapid Transit Act (Sections 9, 24 [subdivision 4], 27 [subdivisions 3 and 8], Section 29 [subdivision 3]) of enforcing, and instituting the necessary suits to enforce, the provisions of the Contracts. If it were held that it is also under the duy of exercising regulatory powers over those Contracts the result would be that there would be imposed upon the Commission, as a *regulatory body* the duty of revising contracts which, as a *contractual party*, it is its duty to enforce. Such a result would be so anomalous that it could not have been intended by the Legislature.

The Rapid Transit Act Expressly Provides for the Character of Public Regulation that May be Exercised. It May be Such, and Only Such, as the Interborough and the Commission might Agree Upon with the Approval of the City.

These limitations appear in connection with the fare provisions of Section 27 of the Rapid Transit Act, which provide:

> "Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and *subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission with like approval.*"

Here, then, is an express delegation of power to the parties (with the *approval* of the Board of Estimate and Apportionment) to provide for *such* "supervision, regulations and requirements" as *by contract* they might determine *but only with the approval* of the Board of Estimate and Apportionment.

Pursuant to this statutory authority, Contract 3, in express terms, delegates to the Commission a variety of regulatory powers with respect, for instance, to service, improvements and equipment, *but none as to the rate of fare*. The powers so delegated by the contract are exercised by the Commission pursuant to the authority contained in the Rapid Transit Act and *not under the Public Service Commission Law*.

Thus, Articles XXXVIII to XLV of Contract 3, under "Equipment Provisions," contain detailed specifications of the character of equipment to be furnished and maintained. Similarly, Articles LVIII to LXIX, relating to "Character of Service, Rate of Fare, etc.," contain in detail provisions with respect to the character of the service and contain the provision with respect to the rate of fare which, it is provided, shall be "five cents but no more."

It is quite evident, therefore, that the parties themselves interpreted this provision of the Rapid Transit Act to mean precisely what it says—that they were authorized *to agree* concerning the character of the "public supervision" over the service to be furnished, which agreement required *the approval* of the Board of Estimate and Apportionment.

This provision should further be read in connection with the "Proviso" contained in Section 58 of the Rapid Transit Act which was added by Section 63 of the Laws of 1894 (*ante*, page 7) declaring that the Rapid Transit Lines constructed at the City's expense shall "remain the *absolute* property of the City" and shall

> "be used and enjoyed by the public upon the payment of such fare and tolls and subject to such reasonable rules and regulations as may be imposed

and provided for *by the Board of Rapid Transit Railroad Commissions in said City or by the Public Service Commission.*"

Manifestly "the Public Service Commission" (added by Section 63 of Chapter 498 of the Laws *of 1909*) here referred to is the Commission in its *contractual* capacity, for it is *coupled* with "The Board of Rapid Transit Railroad Commissioners" by whom Contracts 1 and 2 had been executed in 1900 and in 1902 and *whose only powers were contractual.* The plain intent, therefore, of this provision was to preserve the *contractual* obligations previously imposed by the Board of Rapid Transit Railroad Commissioners under Contracts 1 and 2 and to vest also in the Commission, *as its successor,* full authority in its *contractual* capacity, to "provide for" the rate of fare to be charged and the "reasonable rules and regulations" to be observed.

These statutory provisions, which permit the parties, with the approval of the Board of Estimate and Apportionment, to set up *their own regulatory plan,* demonstrate the intent of the Legislature to establish with respect to Rapid Transit a complete regulatory system between the Company and the Commission acting as the representative of the City, with the approval of the Board of Estimate. They demonstrate, furthermore, the intention thereby to exclude Rapid Transit Railroads from the operation of any general regulatory power over rates contained in the Public Service Commission Law.

Section 38 of the Rapid Transit Act, with respect to the Modification of Contracts Executed under the Rapid Transit Act, further Discloses the Intention of the Legislature with respect to any Alterations thereof.

Had it been the intention of the Legislature to subject the Contracts made pursuant to the Rapid Transit Act to the regulatory powers of the Public Service Commission under the Public Service Commissions Law, it would have so provided in Section 38. Instead of doing so, it provided

that these contracts *might only be modified* if the Public Service Commission, acting for the City, should

> "*agree* with the said contracting person, firm or corporation upon changes in and modifications of said contract."

The exclusion from Section 38 of any intimation that the Contracts might be modified by the Public Service Commission *without the consent* of the other contracting party, speaks louder on this subject than could any words. It is inconceivable that it was intended that the fare provisions of the Contracts which the Commission was authorized to modify by "*agreement*" with the carrier might also be modified *without* the carrier's or the City's consent.

The Contrast between Sections 24 and 27 of the Rapid Transit Act and Section 30 of that Act is Significant.

The Rapid Transit Act does not require, but merely authorizes the City to enter into a contract for the equipment, maintenance and operation of its Rapid Transit Lines. It is under no obligation to lease its subway or other rapid transit facilities, but may, under Section 30 of the Rapid Transit Act, itself maintain and operate these lines. If it concludes to do so, Section 30 is applicable. There we have, *but only in the event that the City shall itself operate the lines*, a legislative declaration as to how the rate of fare shall be determined and the contrast between the provisions of Section 30 and the provisions of Sections 24 and 27 is startling and significant.

Section 30 shows that the Legislature had the question of the rate of fare clearly before it and that in connection with *municipal operation* of Rapid Transit Lines it required that the lines should be operated at a rate of fare which should be not greater nor less than sufficient to produce revenue to pay the charges there specified. If *privately* operated, however, the rate of fare was to be the subject of contract with the operating company, in contradistinction to these provisions *for municipal operation*.

VII.

People ex rel. City of New York v. Nixon, 229 N. Y. 356, is Inapplicable because the Provisions of the State Constitution under which the Franchise Contract there had been Granted did not Authorize, nor had the Legislature Authorized, any Stipulation with Respect to the Rate of Fare.

The *Nixon* case arose out of a situation produced by Article III, Section 18, of the Constitution of the State of New York and should not be confused with contracts made pursuant to the Rapid Transit Act. That article as amended in 1875 provides:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of owners of one-half in value of the property bounded on, *and the consent also of the local authorities* having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, *be first obtained.*"

It will be observed that this constitutional provision *prevents* the Legislature from authorizing the construction of a street railroad except *with the consent* of the local authorities. It does not provide, however, that the Legislature may not by statute prescribe and regulate the conditions under which the right to grant such a consent may be exercised by the *"local authority."* Although the Legislature was prohibited from authorizing the construction of a street railroad without local consent it retained authority to *prevent the construction of Street railroads, except on such conditions* as it might prescribe.

> *Matter of Thirty-Fourth Street R. R. Co.*, 102, N. Y. 343;
> *Beekman v. Third Avenue R. R. Co.*, 153 N. Y. 144.

In this situation the Legislature in 1907 enacted the Public Service Commissions Law regulating rates of fare

and the question arose (*Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244) whether the rates of fare upon which local franchises had been conditioned were subject to alteration by the Commission. It was held that at least those franchises between street railway companies and local authorities executed *before* the enactment of the Public Service Commissions Law (July 1, 1907) were *not* subject to the jurisdiction of the Commission.

It should be observed that the *Quinby case*, followed two years later by the *Nixon case* (soon to be referred to), arose out of questions relating to this provision of the Constitution of the State of New York. Neither in the *Quinby case* nor, as we will show, in the *Nixon case had the Legislature authorized the franchise condition with respect to the rate of fare*. That the question presented arose exclusively under this provision of the Constitution *of the State*, will clearly appear from the comprehensive opinion of the Court in the *Quinby case* to which we respectfully refer this Court.

Concluding its opinion the Court held that the grant of power to the Commission by the Public Service Commission Law was not sufficiently clear to justify interference even with rates specified in *private* contracts executed previous to the Public Service Commission Law:

> "The delegation of legislative power to commissions and other administrative officers and boards need not be assumed if the general words from which such delegation may be inferred are not reasonably so construed.
>
> *In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be.* The Public Service Commissions Law (Sec. 26, Sec. 49, subd. 1) and the Railroad Law (Sec. 181) deal with maximum rates of fare established by statute but *make no reference in terms to rates established by agreement* with local authorities. • • •

> As it has often been held in connections other than that of legislative power over them *that such agreements are valid*, it may well be inferred that the legislature *excluded them from consideration by failure to mention them* and that it has made no attempt to turn them over to the public service commission *for revision*."

A motion for reargument (227 N. Y. 601), made long thereafter, was denied on the same ground.

In *People ex rel. City of New York* v. *Nixon, supra,* the effect of the Public Service Commission Law upon a franchise granted by the City of New York to a Street Railroad Company *after* the enactment of the Public Service Commissions Law (July 1, 1907) was considered and it was held that after the enactment of the Public Service Commissions Law municipalities *acting without authority from the Legislature* had no power by such franchise conditions or contracts *"to nullify existing statutes."*

The facts out of which the *Nixon case* arose are stated as follows in the opinion of the Court (pages 357-358):

> "On October 29, 1912, the South Shore Traction Company *obtained the consent of the City of New York to the construction and operation of a street railway* along stated streets and avenues, chiefly in the Borough of Queens. *The consent was given upon the condition that five cents should be the maximum fare.*"

It is highly important to note that the rate of fare there was imposed under the *"consent"* provisions of the State Constitution and, of course, not pursuant to the Rapid Transit Act, which is not applicable to Street *Surface* lines.

Speaking of the Public Service Commission Law, the Court said (page 359):

> "Rate-making was to be no longer an affair of predominantly *private* interest, in which the state would interfere without system and with spasmodic and intermittent action. A superintending agency of government had taken the matter in hand."

The *Nixon case* resulted, therefore, in the defeat of the local authorities in their attempt to impose terms in con-

nection with their "consents" given *under Article III, Section* 18 *of the Constitution of New York State* for the construction of street railroads *inconsistent with the authority of the State, because the State Constitution under which the "consent" was given did not authorize the imposition of such terms.* If the Constitution of New York instead of merely requiring the *"consent"* of the municipality to the construction of street railroads had provided that in granting its consent the municipality might impose "such terms and conditions as to the rates of fare to be charged * * * as said (municipality) shall deem to be best suited to the public interest," an altogether different question would have been presented in the *Nixon case.* But since the fare stipulation imposed by the local authorities in the *Nixon case were never authorized by the State Constitution,* there could be no question that it was subordinate to the power of the Legislature to regulate the rate. Since the fare stipulation had been imposed *without authority from the Legislature* and was in defiance of the then existing Public Service Commission Law, it was held to be ineffectual because

> "The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, *was notice to municipalities* that franchises thereafter granted must be coupled with *no conditions inconsistent* with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed."

This summary of the conditions presented by the *Nixon case* is sufficient almost without further comment to disclose the wide distinction between such cases and the case at bar. The Contracts in this case, instead of having been made in defiance of the power of the State, *were made under express authority and at the command of the Legislature.* Instead of being in conflict with the prerogative of the State they were made as the result of a special enactment, sought and secured from the Legislature and made expressly applicable to them.

It is precisely as if the State itself had made these Contracts with the Interborough and had *itself* contracted,

as it authorized the City to contract, that the fare should be "five cents but no more." In the *Nixon case* the municipality and the company had agreed concerning the rate of fare in plain *disregard* of a statute regulating rates. The State had not acted nor authorized the contract. The State, in which was vested the supreme regulatory power, was a stranger to the bargain and had withheld and still retained its power over the contract. It was, therefore, not unreasonable to hold, as the Court held in the *Nixon case*, that the State might at any time intervene in the transaction and demolish the agreement.

The scope of the decision in the *Nixon case* in this respect is evident from a few words from that decision (page 362).

> "We are now asked to hold that municipalities by their *contracts* may nullify existing *statutes*. We will not go so far."

In other words, that *municipalities* might not nullify the *statute* (the Public Service Commissions Law). Here the contracts are executed under *a statute* expressly applicable to them. *The same power* that enacted the Public Service Commissions Law has *subsequently* authorized the contracts and has delegated, in express terms, to the City and to the Company the power to "contract" with respect to the rate of fare both in Contract 3 and in the Certificate.*

The Court of Appeals in deciding the *Nixon case* seems to have been fully aware of the possibility that its decision might be misconstrued. Very prudently, therefore, it limited that decision to the particular facts then before it. It said (page 363):

> "In thus holding, it may be prudent, even though unnecessary, *to say that we decide the case before*

* Note—If it were true that the *Nixon* case were applicable to contracts made pursuant to the Rapid Transit Act, it is impossible to explain the plaintiff's aversion to litigating that question in the Courts of New York State, where that principle is said to be conclusively established. The fact that the plaintiff by every method at its command has resisted the submission of this litigation to the State Courts furnishes sufficient evidence concerning the sincerity of its contention in this respect.

> *us, and no other.* The conditions of other franchises may supply elements of distinction which cannot be foreseen."

and it added:

> "We express no opinion upon these and like questions. They are mentioned *only to exclude them from the scope of our decision.* In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed."

The slightest examination of the *Nixon* opinion will demonstrate that the Court was dealing—and consciously dealing—only with the question of the effect of the Law in situations where the parties never had any legislative authority to contract for a fixed rate. The Court held, and held only, that the Law was a sufficiently definite expression of general legislative policy to govern *such public utility contracts made after its enactment as would have been subject to regulation if made before its enactment.*

Although it was earnestly contended that the language of the Law was broad enough to apply to all contracts, *the Court held it too vague to apply even to rates in prior municipal public utility contracts which the City had never had specific legislative authority to make.* The reason given was that contracts already entered into, *though without legislative authority* and hence *subject* to subsequent State regulation, had nevertheless produced rights and obligations which were binding *as between the City and the Public Service Corporation,* and which should remain binding until abrogated by legislation unmistakably applicable thereto. The provisions of the Law could apply to such contracts only as a result of "doubtful inference" which the Court was unwilling to draw. As the Court said, immediately after declaring that the Law had initiated a "new public policy" under which rates "were thereafter to be just and reasonable":

> "The question soon arose whether the new rule was retroactive, and annulled existing contracts in

> conflict with its terms. • • • We held • • • in *Matter of Quinby* • • • that the Legislature did not intend to clothe the Commission with the power to release the obligation of then existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. We did not hold that there was any constitutional restraint upon the grant of such a power. *Restraint under the Federal Constitution, there certainly was none.* • • • Limiting our ruling strictly to the necessities of the case, we held that where the consent of the municipality had been granted upon conditions, *an intent to permit the Commission to impair the obligation of such conditions or of the contract which embodied them was not to be imputed to the Legislature as the result of doubtful inference.* • • • *It was the 'annulment' of a condition already imposed, the 'abrogation of a defeasance' already attached, the impairment of an obligation already created* • • • *which we refused to bring within the jurisdiction of the Commission through words of doubtful import.*"

So explained, the Court clearly evidenced its reaffirmance of the decision in the *Quinby case*. In doing so it removed even the basis for an argument that the construction of the Law which it adopted warrants the conclusion that the Law was intended to affect such legislation as the Rapid Transit Act which specifically authorized the City of New York to contract for a fixed rate of fare on its Rapid Transit lines. If the rate regulating provisions of the Public Service Commission Law are only "words of doubtful import" which should not be applied "as the result of doubtful inference" even to *private contracts* concededly subject to regulation, *a fortiori* ought not these same provisions be construed, so as not to nullify important provisions in a comprehensive *later statute* dealing in detail with *a special subject*, not referred to in the rate regulating provisions of the Public Service Commission Law, and to which those provisions can apply only as the result of an inference vastly more doubtful than that rejected in the *Quinby* and *Nixon* cases.

VIII.

By Contract 3 the Fare Provisions of Contracts 1 and 2 were Not Superseded and, Moreover, Contract 3 is "so Related" to those Contracts, both of which Antedated the Public Service Commission Law, that the Fare Provisions of Contract 3 are Excluded from the Regulatory Provisions of that Law.

Both Contracts 1 and 2 were made *before* the enactment of the regulatory provision respecting fares contained in Section 49 of the Public Service Commission Law. Hence, as the Court of Appeals has decided, the provisions of Section 49 can, in no event, have any relation to those contracts.

> *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 224; 227 N. Y. 601.
>
> *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356.

Realizing that Contracts 1 and 2 *antedated* the enactment of the regulatory provisions of Section 49 and that hence those provisions could not, in any event, possibly be deemed to have entered by implication into their terms, the plaintiff contends that the *fare provisions* of Contracts 1 and 2 were *abrogated and superseded* by the provisions of Contract 3, which provided for a five-cent fare upon the enlarged and extended system of subway lines.

There is no basis for that contention. Contract 3 shows the definite purpose, repeatedly expressed and emphasized in unmistakable terms, to keep alive and in full force the obligations of Contracts 1 and 2, including those respecting fare.

Contract 3 expressly provides (Art. I) that:

> "Nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under contract number 1 and contract number 2 excepting in the respect and to the extent herein specifically set forth."

It further provides (Art. LXII):

> "The Lessee shall, during the term of the contract, be entitled to charge for a single fare upon the Railroad *and* the Existing Railroads the sum of five (5) cents but no more."

The scheme of Contract 3 was to extend the five-cent fare applicable to "the Existing Railroads" by providing for "a *single* fare" of five cents over the entire system. But that in no way abrogated the fare provisions of the prior contracts. Those provisions remained effective and were *extended* to the larger system. The obligations of Contracts 1 and 2 *were in express terms continued.* Why otherwise the provision that the lessee should be entitled to charge the sum of five cents but no more.

> "upon the railroads *and* the existing railroads."

The contract thus left unaffected the rate of fare on the existing lines, requiring the lessee, however, to carry passengers for the same rate of fare *over the extensions* to be constructed under Contract 3.

The District Court has quoted extensively from the opinion of Cardozo, *J.*, in the *Nixon Case*, but it has omitted one of its most significant passages. The court there said (p. 362):

> "Contracts made after the passage of the Statute may conceivably *be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions.* We express no opinion upon these and like questions. They are mentioned only to *exclude* them from the scope of our decision."

We submit that the conclusions of the District Court on this aspect of the case cannot be sustained. The fact that there were *other* modifications in the Contracts can have no possible effect on the question of the fare. It will not be contended, we assume, that if the parties, by Contract 3, had modified the rental payable to the City or perhaps the length of the term of Contracts 1 and 2, either or both of these modifications would in any way have affected *the fare provisions* of those Contracts made before

the enactment of the Public Service Commission Law or operated to release those provisions from the rule laid down in the *Quinby case*.

From a practical point of view this decision, if sustained, would be distinctly detrimental and unjust to the public interest. It would mean that if a street railroad operating under a franchise whose rate of fare was limited or protected under the decision in the *Quinby Case*, should construct *a single spur*, no matter how unimportant that spur might be, and agree, as it probably would agree, to transport passengers *both* over the new spur and the earlier system for *a single* fare, all its franchises would thereby be extinguished and the rate of fare on the entire system subjected to revision.

This precise point was decided on the re-argument in

People ex rel. Garrison v. *Nixon*, 229 N. Y. 645,

where a later franchise was held not to have superseded franchises granted previous to the enactment of the Public Service Commission Law.

Again in

Matter of Evans v. *Public Service Commission*, 246 N. Y. 224,

it was held that because the later contract *did not contain a five-cent fare provision, such as Contract 3 contains*, the earlier franchise rates were abrogated.

Even if Contract 3 had Superseded Contracts 1 and 2 it is "So Related to the Earlier Contracts" as to Fall Within the Exception Stated in the Nixon Case and Applied in the Garrison Case.

When the Court in the *Nixon case* observed that contracts might be

> "so *related* to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions,"

it did not imply that, because the later contract superseded earlier ones, it would be subjected to the jurisdiction

of the Commission. Indeed, it is not possible that this was the intention, for contracts made *before* the enactment of the Public Service Law were, *under all conditions,* excluded from the jurisdiction of the Commission *by the Quinby case.* Since, therefore, such contracts remained effective *in any event,* there was no reason to refer to them at all. But the Court in the *Nixon* and *Garrison cases* proceeded further than in the *Quinby case* and held that later contracts if *"related* to earlier contracts, either by words of reference or otherwise," were not subject to the Statute.

The proper inquiry, therefor, is whether *the fare provisions* of Contract 3 are *"related to"* the earlier Contracts because it is not necessary that the earlier Contracts with respect to fare *shall continue in existence.* The language of the Court in the *Nixon case* and its decision in the *Garrison case* apply particularly to cases where the later contracts are merely so *"related* to earlier contracts" as to make it possible to conclude *that the provisions of the earlier contracts may have animated the parties in executing the later contracts.*

Here not only is Contract 3 *"related to"* Contracts 1 and 2 with respect to the *subject matter* involved (since the modification of Contracts 1 and 2 *furnished in part the consideration for Contract* 3) and, not only are they expressly "related" to each other *"by words of reference"* but the *Legislature declared them to be "so related"* when it enacted those provisions of Section 27 of the Rapid Transit Act which required the *extended* system to be operated at the *"single* fare" at which the existing lines were then in operation *under Contracts* 1 *and* 2.

PART III.

THE RATE OF FARE.

Assuming that the *fare provisions* of the Contracts are subject to the jurisdiction of the Commission and furthermore, that this Court has jurisdiction to increase the rate because the Commission has refused to do so, is the five-cent rate confiscatory, taking into account the value of the plaintiff's property, which here is distinctly affected and limited by the Recapture provisions of Contract 3 and the Certificate?

I.

The Earnings of the Interborough since 1920, even as Alleged in the Complaint, have Consistently Increased, notwithstanding the Increased Cost of Labor and Materials.

The *net revenue* of the combined operations of the Subway and Elevated Lines have constantly and consistently increased. This is shown by the following tabulation of *"earnings available as a return"* as stated in Paragraph LX of the Complaint (Record, pages 82-83) as follows:

	Earnings available as a return.
"1921	$15,828,434
1922	17,974,948
1923	17,645,908
1924	19,436,182
1925	20,404,446
1926	23,698,721
1927	22,622,761"

The earnings shown for the year 1927 are shown after allowing for a loss of about $2,000,000 in that year caused by a Strike (Record, page 1168) and for other expenditures against which the Commission has protested. And

the earnings for the year 1928 as so far known greatly exceed these figures (Record, pages 1168-1169, also 1065).

This unusual increase in earnings notwithstanding increased costs, is principally due to a 40% increase in the density of traffic, a smaller number of employees (made possible by mechanical improvements) to handle this increased volume of traffic and to technical improvements in the production of electric current (Spinrad's Reply Affidavit and Schedule 1 attached thereto, Record pages 1194-1196).

II.

The Plaintiff is Earning More than a Fair Return on its Property, both Subway and Elevated, Based upon its Actual Investment therein.

This investment according to the *Commission's* figures is shown in Table 1 annexed to the Reply Affidavit of Norman C. Hill (Record, page 1178). It shows a total investment of $287,550,474.

According to the *Interborough's* contention, which is contested by the Commission, its total actual investment is $343,842,464 (Affidavit of William S. Gorsuch, Record, pages 852-853).

For the year 1927 (after compensating for the Strike) the plaintiff, accepting its own figures, would have earned $24,622,761 and its net income for the year 1928 is certain considerably to exceed that sum (Record, pages 1168-1169). Based, therefore, upon the Commission's figures of actual investment this would amount to *a return of over 11%* and based upon the Interborough's contention with respect to its actual investment, it would amount to *a return of over 7%*.

III.

The Value upon which the Plaintiff is Entitled to a Fair Return is Determined by the Character of its Interest in the Property, and that Value is Limited by the Provisions of Contract 3 and of the Certificate.

Both Contract 3 and the Certificate contain provisions for Recapture at the *actual cost of the lines and* 15% *besides* after ten years (which have now expired) from the beginning of operations. These Recapture provisions affect all the lines constructed under Contract 3 and the extensions and additional tracks constructed under the Certificate. All those lines are, accordingly, subject to the City's right of Recapture at any time until the expiration of the Lease and the Certificate.

The return to which the plaintiff is entitled is measured by the value of the property or interest which *the plaintiff* is contributing to the public use and this in turn depends upon the nature of the plaintiff's interest in the property. If it consists of property owned in fee the return will depend upon the value of the property so held, but if, as in this case, it consists merely of a leasehold interest which on account of the provisions of the lease is of constantly diminishing value and can in no event exceed a stipulated sum, the plaintiff's right to a fair return is to be determined by the *value of its interest* in the property devoted to the public use. The general principle expressed by the District Court that

> "the return guaranteed by the Constitution is upon the property devoted to public use"

is correct, but that Court failed to apply that principle to the conditions existing in this case because it has not recognized that the property devoted by the plaintiff to public use consists almost exclusively of leaseholds whose value cannot, on any conceivable theory, be equal to the value of the property of which it is lessee.

The Value of the Property upon Which the Plaintiff is Entitled to a Fair Return is Exactly the Equivalent of the Value to Which it Would be Entitled if its Property were Taken by Eminent Domain

The question here presented may be answered by inquiring what the plaintiff would be entitled to receive if its system were taken under the right of eminent domain. Manifestly if the entire property were taken into condemnation proceedings the plaintiff's interest would be measured by the value of *its lease*. *The City's interest* would be measured by the value of *the property* minus the value of the plaintiff's lease.

Clarkson v. *Skidmore*, 46 N. Y. 29.
Corrigan v. *City of Chicago*, 144 Ill. 537; 33 N. W. 746.

Where private property is taken for public use by exercise of the right of eminent domain, the basis upon which the award is determined is the value *to the owner* of the property taken from the owner, and not the value *to the public* of the property taken. This is emphasized by the peculiar facts in *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189.

If it be true, then, that no violation of any constitutional right of the plaintiff would occur if its entire system of rapid transit railways were taken under the right of eminent domain and it were paid merely the value of its leasehold, upon what theory is it entitled, under the Constitution, to a return upon a valuation that exceeds the value thus computed. The Constitution protects property against seizure without due process of law or without just compensation and to the same extent and upon identical principles it protects a reasonable return *upon the property thus protected against seizure*. The relation between the property and the income is direct. Both are protected to the same extent and it would be anomalous to hold that the plaintiff's interest in its rapid transit system could be taken for a fraction of the amount on which the plain-

tiff was entitled to earn a reasonable return. The return would be neither "fair" nor "reasonable" if it should exceed a fair or reasonable return on the value that the plaintiff would receive for *its interest* in the property, whether that interest were taken by eminent domain or in any other way.

In *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, this analogy was applied and it was stated that the question whether rates were such as to deprive a party of property without due process of law was analogous to the question whether the property under consideration was taken for public use without just compensation. The Court said:

> "The question arising is as to the validity of the Acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this Court. Rates must be plainly unreasonable *to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation* as under the circumstances is just both to the owner and to the public."

The analogy between the valuation of property for purposes of condemnation and its valuation for purposes of determining a reasonable return was expressed in *San Diego Water Co.* v. *City of San Diego*, 118 Cal. 556; 50 P. R. 633, as follows:

> "The question of what is just compensation in such a case is, we think, *in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain;* and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use."

In that case the question involved related to the fixing of reasonable rates and it was held that the rates should be fixed upon the value of the property determined in the same manner that such value would have been determined in condemnation proceedings.

On Account of the Recapture and Amortization Provisions of Contract 3 and the Certificate the Value of the Property on which the Plaintiff is Entitled to Earn a Fair Return can in No Event Exceed by More Than Fifteen Per Cent. its Original Investment Cost.

It should be observed that under the provisions of the lease (Chapter II of Contract 3) there is required to be paid and has been paid annually to the Interborough six per cent. of its contribution toward the cost of construction and the cost of equipment furnished under Contract 3.

> "out of which the lessee shall set aside amounts sufficient with interest and accretions thereon *to amortize within the term of the lease such contribution and such cost.*"

It should thus be observed that at the end of the term of forty-nine years, of which ten years have now expired, the Interborough will have no interest (except the very trifling one heretofore mentioned) in the Subway System or in its equipment and eventually it will have no interest in the additional tracks and extensions constructed under the Certificate.

Under these circumstances it becomes unnecessary to consider the far-reaching question of whether the rate of return is determined by the *original* cost of the property or its *present* value. The lease—which is the property to be valued in this proceeding—cannot exceed in value the recapture price and, for the further reason that the operations have continued for ten out of the forty-nine years, at the end of which the plaintiff must relinquish the property without compensation, the value of the lease at this time is necessarily very much less than the recapture price.

It has frequently been held that such provisions should be accorded proper weight in determining the value of a leasehold.

Matter of William and Anthony Streets, 19 Wend. (N. Y.) 678.

Des Moines Wet Wash Laundry v. *City of Des Moines*, 197 Iowa 1082; 198 N. W. 486.

Corrigan v. *City of Chicago*, 144 Ill. 537; 33 N. W. 746.

The decision of the District Court allowing an increase in the rate of fare upon the theory that the plaintiff is not receiving a reasonable return upon its property is based upon the proposition that the plaintiff is entitled to a reasonable return upon *the present reproduction value not only of* the property provided by the plaintiff in its system of Rapid Transit but also upon *the present reproduction value of the property of the City of New York*, disregarding altogether *the right of the City to recapture* the recapturable lines and equipment.

We insist that this principle is inapplicable here because the value of the plaintiff's rights are, as to the recapturable property, limited by the City's rights of recapture. In so far as the non-recapturable lines are concerned, the value of the plaintiff's rights are limited by the condition that this property (together with the recapturable property) must, at the expiration of the term, *be surrendered to the City without compensation to the plaintiff*. And, it is important to observe that upon recapture no compensation is payable to the plaintiff *on account of the City's investment* in the recaptured lines.

IV.

At a Five-Cent Fare the Interborough is Earning a Reasonable Return upon the Present Fair Value of its Property Devoted to the Public Service.

In the summary that follows, therefore, which we have computed in the manner heretofore indicated we have calculated (for the purposes of this discussion only) the plaintiff's investment in the non-recapturable property at the *plaintiff's* estimate of present reproduction value (Schedule A, Replying Affidavit of Henry T. Berry, Record, pages 1078-1079) except with respect to the Original Manhattan Elevated Property*, less a depreciation, wherever, applicable, of 20% for the expired period of the lease. We have calculated original cost according to Table 4 of the Affidavit of Norman C. Hill (Record, page 1181) submitted by the Transit Commission, because there is no very substantial dispute concerning these original costs.

COMPANY OWNED PROPERTY.

Property owned by the Company under Contracts 1 and 2 (taken at plaintiff's estimate of present value)	71,378,000
Property owned by the Company under Elevated Certificates (recapturable) taken at original cost ($43,815,000) plus 15%	50,387,250
Manhattan Railway Original property taken at Commission's estimate of present value.	70,802,000
Materials and supplies	2,318,517
Cash working capital	3,087,957
Total Company owned property	$197,973,724

* NOTE—As to the Original Manhattan property, we have taken the Commission's valuation "On Basis of Cost to Reproduce New—less depreciation (Affidavit of Norman C. Hill, Record, pages 1182-1183) at $70,802,000." We have *not* taken the plaintiff's estimate, as shown by the affidavit of William S. Gorsuch (Record, pages 846-854) at $143,556,000, because that affiant expressly *excludes* any depreciation (Record, pages 843-844, 845, 849). It must be obvious that the Original Manhattan Elevated Lines (over fifty years of age) are affected by heavy depreciation and that any estimate based upon "Reproduction Cost—*New*" which leaves out of account accumulated depreciation during all these years furnishes no accurate picture of *present* value.

COMPANY PROVIDED PROPERTY.

Property provided by the Company under Contracts 1 and 2 ($35,410,000) required to be surrendered without compensation at end of term, taken at plaintiff's estimate of present value, less 20%	$ 31,879,000
Property provided by Company under Contract 3 (recapturable) at cost ($120,817,000) plus 15%	138,939,250
Total Property provided by Company	$170,818,250

COMPANY OWNED AND COMPANY PROVIDED PROPERTY.

Company owned property	$197,973,724
Company provided property	170,818,250
Total	$368,791,974

Since the plaintiff's income from the combined operations of the Subway and Elevated Lines for the year 1926 (according to the allegation of *the Complaint*, Record, pages 82, 83) was $23,698,721 and (adding $2,000,000 loss due to the 1927 strike) $24,622,761 for the year 1927, the plaintiff's return on an investment of $368,791,974, as above calculated, was almost exactly 6½% for 1927. Moreover, there is every indication that its income for the year 1928 will greatly exceed these figures (Record, pages 1168-1169). This is shown by the fact that for the seven months (July 1, 1927, to January 31, 1928) the plaintiff's net revenue from the operation of the Subways was $2,601,717.25 as compared with a net revenue of $2,579,429.45 for the *entire fiscal year 1927* (Record, page 1168).

V.

On Account of the Interborough's Preferentials under Contract 3 and the Certificate it is not Entitled to a Return of 8 Per Cent.

We insist that the plaintiff is not entitled to an 8% return conceded to it by the District Court on the assumption that the plaintiff's investment was of the usual kind and was subject to the usual risks incident to an investment in *common* stock. On account of the preferentials by which the plaintiff is entitled to its proportion of earnings *to the exclusion of the City* it occupies the position of a *preferred* stockholder, and for that reason is not entitled to the high rate of return of 8% which in certain exceptional cases has been sustained on account of the unusual risk involved. It is matter of common knowledge that ordinary preferred stocks, even of industrial enterprises, not enjoying the practical monopoly under which the plaintiff operates, are bought and sold today on the basis of a return of 5 to 5½%. Here, *subordinate to the plaintiff's investment and thus safeguarding it*, is the City's investment of several hundred million dollars.

In fact, as we have previously shown (*ante*, pages 22-24) *this was the very purpose* of these preferential payments to the Interborough.

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, this Court sustained, as not confiscatory, a rate of 6% and it was there stated (pages 48-49) that rate of return should be in direct relation to the risk involved.

This Court, in recent cases, has sustained, as non-confiscatory, a rate of return of 6% and even as low as 5½% even upon an investment representing the *outright ownership* of property where no preference was involved as there is here.

In *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, this Court sustained the provisions of the Transportation Act of 1920 limiting the rate of return to the railroads to 5½%.

In *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, this Court sustained a rate of 6%.

In *Des Moines Gas Co.* v. *City of Des Moines*, 238 U. S. 153, this Court sustained a rate of 6%.

All these decisions, however, involved the outright ownership of property, whereas here, on account of the preferentials, the plaintiff is in the position of a *favored* stockholder.

From the following list of securities taken from the current market quotations of the New York Stock Exchange as of December 1, 1928, it will be found that preferred shares, although principally in *industrial* enterprises, at prices prevailing today produce a return averaging 5.35%. It is, therefore, difficult to understand on what theory the plaintiff should receive an 8% return on its investment in a public service corporation in the largest city in the world, which so far as human experience indicates is secure against the usual risks affecting the commercial enterprises whose shares are included in this list:

Description of Security	Selling at	Rate of Return
American Sugar Refining Co. 7% Preferred	108	6.48
Bethlehem Steel Corporation 7% Preferred	122	5.73
General Motors 7% Preferred	125	5.60
Illinois Central Railway 6% Preferred	140	4.28
International Harvester 7% Preferred	142	4.93
United States Steel Co. 7% Preferred	141	4.97
National Biscuit Co. 7% Preferred	143	4.90
Public Service Co. of New Jersey 7% Preferred	119	5.88
Average rate of return		5.35

It is true that in *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, this Court held a rate of 8% *in 1920* to be a reasonable return. That decision, however, was *expressly* predicated on the fact that *at that time* (immediately following the World War) returns upon capital were very high.

Conclusion.

We submit, in conclusion, that there is one consideration of supreme importance here, and it is this:

The contention of the Appellee is based on statutes of New York under which it contends that the Legislature *intended to delegate to the Commission the duty of revising these contractual rates.* If this Court should sustain that contention and should further hold (as it must, if it should sustain the Order of the District Court) that, the failure of the Commission to increase the rate impaired the Appellee's constitutional rights, then it will be claimed by the Interborough Company that nothing that the Legislature may *hereafter* do can deprive the Appellee of its right to the constitutional immunity thus sustained. If, however, this Court should hold, as we submit it should, that *no Federal question is involved* or that under these statutes the Legislature *did not intend to delegate these extensive powers to the Commission with respect to Rapid Transit rates*, the Legislature might still, under such a decision on *either* of those points, by *further* legislation, remove any doubt as to what was its true intention.

SAMUEL UNTERMYER,
IRWIN UNTERMYER,
Counsel.

FILED
JAN 9 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 159.

JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, *et al.*,

Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY.

REPLY BRIEF OF APPELLANT, TRANSIT COMMISSION, ON REARGUMENT.

SAMUEL UNTERMYER,
IRWIN UNTERMYER,
CHARLES DICKERMAN WILLIAMS,
Counsel.

INDEX.

PAGE

PART I.

JURISDICTION OF THE FEDERAL COURT 1

Preliminary 2

The Distinction Suggested Is Without Importance Here 2

The Allegations of the Complaint Were Insufficient to Give Jurisdiction to the District Court 3

I.

It appears to be conceded that the interlocutory Order cannot be sustained, in so far as it enjoins the Commission and the City, as contractual parties to Contract 3 and the Certificate, from instituting judicial proceedings in the State Courts to enforce the Contracts 4

II.

The proceeding instituted by the Commission under Section 57 of the Public Service Commission Law was not to enforce any statute or order but was brought to require the Interborough Company, a public service corporation, to perform its contractual obligations to the City of New York and to its inhabitants 8

III.

Allegations that the Commission intended to act adversely on the Interborough's application for an increased fare do not, in the absence of action by the Commission previous to the institution of this suit, state a cause of action. Such functions are legislative and may not be enjoined on the theory that the legislative body intends to exercise them in an unconstitutional way 13

PAGE

If We Assume that the Interborough Company Could Secure an Increased Fare by Filing Amendatory Schedules Under Section 29, it Would Have Required Affirmative Action by the Commission to Prevent Those Schedules from Becoming Effective on March 3, 1928, Which Action the District Court Had No Power to Enjoin..... 19

IV.

In Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway, 273 U. S. 625, and Denney v. Pacific Telephone and Telegraph Company, 276 U. S. 97 (both cited by the Appellee), the Commission had released the Utility from the Contract rate. The Utility having been released was no longer bound by Contract and could maintain suit in the Federal Court for a compensatory rate..... 21

V.

The plaintiff may not proceed against the Orders made by the Commission in 1920 and 1922.. 25

It Has Been Conceded by the Appellee that the Commission Had no Jurisdiction to Grant the Application for an Increase Made in 1922.... 25

The Plaintiff Could Not in 1928 Proceed Against the Order of the Commission Upon Its Application Made in 1920..... 26

(1) The Schedules Voluntarily Filed by the Plaintiff in 1925 at a Five-Cent Fare..... 26

(2) The Interlocutory Order Is Not Limited to the Order Made by the Commission in 1920, and if so Limited Would Be Entirely Ineffective..... 27

PAGE

(3) The Absence of Any Evidence that the Fare on the Subway Lines in 1920 Was Confiscatory. 28

(4) The Effect of the Amendment Enacted in 1922 to Section 49. 29

(5) The Institution by the Plaintiff, and Its Subsequent Abandonment, of Certiorari Proceedings in the State Courts. 30

VI.

The plaintiff effectively contracted away its constitutional right to a compensatory rate when it executed contracts which are binding on the parties. The indispensable element of an effective contract is the inability of the parties to recede from it, not the absence of State control over the contractual rate. 30

In Order that a Utility May Effectively Contract Away its Right to a Compensatory Rate it is Not Necessary that the Contract Shall Have Been Authorized by or be Binding on the State. 32

VII.

The Public Service Commission Law does not prohibit private contracts with respect to rates. In this respect the Chariton case, where regulatory powers were vested in the City which it was expressly forbidden to curtail by contract, and the San Antonio case, are wholly inapplicable 36

It is Settled by Uniform Authority that a Rate Contract, Although Not Authorized by Legislation, is Binding on the Parties, Notwithstanding the Existence of a Public Service Commission Law, Until the Commission has Interposed and Changed the Contract Rate. 44

PAGE

The Legislature of New York Has Repeatedly Recognized in the Public Service Commission Law the Validity of Rate Contracts..... 49

Recognition by the Interborough Company of the Validity of the Contracts..... 51

The Contracts Here Were, However, Expressly Authorized by Legislation Even if it be Assumed that they Were Subject to the Jurisdiction of the Commission..... 52

VIII.

There has been no attempt to enforce against the Plaintiff the provisions of Chapter 743 of the Laws of 1894, nor does the Complaint so allege 53

IX.

The Plaintiff's allegations of forcible interference with its property are without substance and, moreover, present no Federal question..... 54

PAGE

PART II.

JURISDICTION OF THE COMMISSION..... 55

I.

The public policy of New York State is expressed at least as effectively in the Rapid Transit Act as in the Public Service Commission Law..... 57

II.

The decisions of this Court establish that contracts for a permanent rate of fare were authorized by the provisions of the Rapid Transit Act 60

III.

The Appellee's interpretation of the Admiral Realty Co. case shows that the question presented here was decided there..... 62

IV.

Even if Rapid Transit Railroads are included in the definitions of the classes of carriers subject to the jurisdiction of the Commission, it does not follow that rate contracts made with legislative authority are subject to its regulatory jurisdiction 64

V.

The fact that the Commission under the express provisions of Contract 3 has exercised jurisdiction over service on the Subway lines is not inconsistent but consistent with our contention.. 66

PAGE

VI.

The Appellee's contention that the power of the parties to agree upon the rate of fare under the authority of the Rapid Transit Act is limited to "fixing an initial fare" would, if sustained, render the provisions of the Rapid Transit Act meaningless and nugatory 68

The Nixon Case 70

The Nixon Case, Considered in Connection with the Charter Powers of the City, Is the Strongest Possible Authority for Sustaining the Contracts Here 73

The Provisions of Section 45 of the Greater New York Charter, Expressly Applicable to the Rapid Transit Act, Prove That the Limited Powers of the City to Contract Under the Charter Should Not Apply to the Unlimited Contractual Power of the Commission and the City Under the Rapid Transit Act 76

VII.

In People ex rel. Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216, and People ex rel. Bridge Operating Co. v. Public Service Commission, 153 App. Div. 129, the power conferred by Statutes which allowed "reasonable regulations" in the first case and authorized the Trustees of the Bridge "to fix the rates of toll" in the second case, were held not to authorize Contracts with third persons for a specified term concerning the rate of fare 77

VIII.

Town of North Hempstead v. Public Service Corporation, 231 N. Y. 447, and Public Service Commission v. Pavilion Natural Gas Co., 232 N. Y. 146, cited by the Appellee, both involved proceedings under sections of the Public Service Commission Law relating to Gas corporations which differed entirely from the provisions with respect to Railroads 82

The Dates Now Become Important 87

PAGE

PART III.

THE RATE OF FARE 90

I.

Whatever may be the rule in the ordinary case the plaintiff, on account of the conditions upon which it secured and now holds the City's property, is not entitled to more than a fair return upon its actual investment therein 90

II.

The value of the Interborough Company's interest is limited by the City's rights of recapture, notwithstanding that those rights have not yet been exercised 91

Conclusion 95

APPENDIX 1

TABLE OF CASES.

PAGE

Admiral Realty Co. v. City of New York, 206 N. Y. 110.....60, 62, 63, 64

Boston Chamber of Commerce v. Boston, 217 U. S. 189..... 93

Columbus Railway Co. v. Columbus, 249 U. S. 399, 407.....2, 4, 60

Cleveland v. Cleveland City Railway Co., 194 U. S. 517.....33, 60

City of Buffalo v. Frontier Telephone Co., 203 N. Y. 589.....34, 45

City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13.....34, 45

Civil Rights Cases, 109 U. S. 3..... 54

Corrigan v. Buckley, 271 U. S. 323..... 54

City of New York v. Brooklyn City R. R., 232 N. Y. 463..... 58

Denney v. Pacific Telephone and Telegraph Co., 276 U. S. 97.....21, 23, 25

Des Moines v. Des Moines Railway Co., 214 U. S. 179. 3, 4

Detroit v. Detroit Citizens Railway Co., 184 U. S. 368. 33

Detroit United Railway v. Michigan, 242 U. S. 238... 60

Farrell v. O'Brien, 199 U. S. 89, 100..... 3

Gaines v. Thompson, 7 Wall. 347..... 17

Georgia R. & Power Co. v. Decatur, 262 U. S. 432... 33

Hull v. Burr, 234 U. S. 712, 720..... 3

Home Telephone & Telegraph Co. v. City of Los Angeles, 211 U. S. 265.....33, 77, 79

Henderson Water Co. v. Corporation Commission, 269 U. S. 278.....34, 44, 45

Henrici v. South Feather Land Co., 177 Cal. 442....34, 45

In re Rahrer, 140 U. S. 545..... 54

PAGE

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467. 33
Los Angeles v. Los Angeles City Water Co., 177 U. S. 558. 33
Lanowee County Gas & Electric Co. v. City of Adrian, 209 Mich. 52. 34, 45

Matter of International Railway Co. v. Rann, 224 N. Y. 83. 8
McChord v. Louisville & Nashville R. R. Co., 183 U. S. 483. 17, 38
Manufacturers Railway Co. v. United States, 246 U. S. 457. 18, 90
Milwaukee Electric Railway & Light Co. v. Railroad Commission, 238 U. S. 174. 34, 45
Monroe (City of) v. Detroit M. & T. Short Line R. Co., 187 Mich. 364. 34, 45
Matter of Quinby v. Public Service Commission, 223 N. Y. 241. 41, 66, 72
Matter of Daly, 29 App. Div. 286. 93
Matter of Pier 39, 62 App. Div. 271 (aff'd 168 N. Y. 254). 93
Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612. 44

Norton v. Whiteside, 239 U. S. 144, 146. 3
New Orleans v. Paine, 147 U. S. 261. 18
New Orleans Gas Co. v. Louisville Light Co., 115 U. S. 650. 33

Oregon v. Hitchcock, 202 U. S. 70. 18
Opelika v. Opelika Sewer Co., 265 U. S. 215. 34, 44
Omaha Water Co. v. City of Omaha, 147 Fed. 1. 60

Public Service Commission v. Iroquois Natural Gas Co., 184 App. Div. 285 (aff'd 226 N. Y. 580). 88
Public Service Commission v. Pavilion Natural Gas Co., 232 N. Y. 146. 82, 83, 87
People ex rel. Bridge Operating Co. v. Public Service Commission, 153 App. Div. 129. 77, 79, 80
People ex rel. Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216. 77, 79, 80

PAGE

People ex rel. New York, New Haven & Hartford Railroad Co. v. Wilcox, 200 N. Y. 423..... 58
Pond v. New Rochelle Water Co., 183 N. Y. 330..... 8
Public Service Commission v. Westchester Street R. R. Co., 206 N. Y. 209..... 10
Prentis v. Atlantic Coast Line Co., 211 U. S. 210....13, 28
Producers Transportation Co. v. Railroad Commission of California, 251 U. S. 228..... 33
People ex rel. New York, Westchester & Boston Railway Co. v. Public Service Commission, 193 App. Div. 445 (aff'd 230 N. Y. 604).....34, 45, 73, 74
People ex rel. City of New York v. Nixon, 229 N. Y. 356.....37, 41, 52, 70, 71, 73
Parker v. Elmira C. & N. R. R. Co., 165 N. Y. 274..55, 70

Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway, 273 U. S. 625.....21, 22, 23, 25

Salinger v. United States, 272 U. S. 542, 544..... 3
Shulthis v. McDougal, 225 U. S. 561, 569..... 3
Southern Utilities Co. v. Palatka, 268 U. S. 232...34, 44
State ex rel. Spokane v. Kuykendall, 119 Wash. 107. 24
St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352..... 33
Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291.....34, 45
Superior Water, Light & Power Co. v. City of Superior, 263 U. S. 125..... 33
Salt Lake City et al. v. Utah Light & Traction Co., 52 Utah 476.....34, 45
Southern Iowa Electric Co. v. Chariton, 255 U. S. 539.....35, 36, 38, 42, 43, 44
San Antonio v. San Antonio Public Service Co., 255 U. S. 547.....35, 36, 38, 43, 44

Traverse City v. Michigan Railroad Commission, 202 Mich. 575.....34, 45
Town of North Hempstead v. Public Service Corporation, 231 N. Y. 447.....82, 83, 86
Taylor v. State, 124 N. Y. Suppl. 818..... 93

PAGE

United States v. Fletcher, 147 U. S. 664 18

Union Dry Goods Co. v. Georgia Public Service Commission, 248 U. S. 372 33

United Mine Workers v. Chafin, 286 Fed. 959 54

Vicksburgh v. Vicksburgh Water Works Co., 206 U. S. 496 33

Virginia v. Rives, 100 U. S. 313 54

Village of Fort Edward v. Hudson Valley Railway Co., 192 N. Y. 139 58

Wilcox v. Richmond Light & Railroad Co., 142 App. Div. 44 (aff'd 202 N. Y. 515) 9

Wichita Railroad & Light Corporation v. Public Utilities Commission of the State of Kansas, 260 U. S. 48 ..... 34, 44, 45, 46, 83, 84

TABLE OF STATUTES, ETC.

PAGE

Constitution of the United States—
Article I, Section 10 33

Constitution of the State of New York—
Article III, Section 18 ..... 37, 57

Public Service Commission Law—
Laws of 1907:
Chapter 429 ..... 37, 74
Section 2 64
Section 26 ..... 39, 40, 67
Section 28 ..... 39, 83, 84
Section 29 ..... 20, 27, 39, 47, 83, 84, 85, 86, 88, 89
Section 33 27
Section 49 ..... 14, 26, 27, 29, 39, 46, 49, 50, 82, 85
Section 57 ..... 8, 9, 10, 12
Section 66 ..... 82, 83, 84, 86, 87, 89
Section 72 ..... 82, 83, 86
Laws of 1914:
Chapter 250, Section 29 86
Laws of 1921:
Chapter 134 ..... 49, 50, 51, 64, 85, 87
Section 105, Article VI 50
Laws of 1922:
Chapter 153 ..... 26, 29, 50, 51
Laws of 1923 51

Rapid Transit Act 55, 60
Laws of 1909:
Section 24 ..... 56, 59, 60
Section 27 ..... 56, 59, 67, 73
Laws of 1912:
Section 24 ..... 56, 59
Section 27 ..... 56, 59
Section 30 56
Section 38 56
Section 73 73
Section 74 73

PAGE

Special and General Laws—
Laws of 1894, Chapter 743 ..... 20, 53

Railroad Law—
Section 12 58

Greater New York Charter—
Laws of 1907, Chapter 439:
Section 45 ..... 74, 75, 76
Section 73 ..... 74, 76
Section 74 ..... 74, 76

General Construction Law—
Section 95 59

Laws of Other States—
Public Service Utilities Law of Kansas 46
Section 13 ..... 46, 47, 49
Section 20 ..... 46, 47, 49

Supreme Court of the United States

JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, et al.,

Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY.

REPLY BRIEF ON BEHALF OF APPELLANT, TRANSIT COMMISSION, ON REARGUMENT.

In this Reply we will limit ourselves to the consideration of the questions presented by the Appellee's brief, but in doing so we will reclassify those questions in the order in which they appear in our earlier brief.

PART I.

JURISDICTION OF THE FEDERAL COURT.

We will *assume* in this part of our Reply, as we assumed in Part I of our earlier brief, that the Contracts are subject to the jurisdiction of the Commission and that it was the duty of the Commission, when properly appealed to, to revise the contract rate.

Divisions I, II, III, IV and V of Part I of this Reply relate to the question of whether any Federal right had

been denied the plaintiff *at the time of the institution* of this suit. The remaining Divisions (Divisions VI, VII, VIII and IX) relate to the question of whether any Federal right has been denied, *even at the present time*.

Preliminary.

Preliminary to the consideration of the underlying questions here we will consider the distinction, and the validity of the distinction, suggested at pages 7 and 8 of the Interborough brief, between cases where the Federal Courts are *without* jurisdiction and cases where they have jurisdiction but *may not exercise that jurisdiction* because no Constitutional right is shown to have been impaired.

The Distinction Suggested Is Without Importance Here

This distinction is without any practical importance here. If the Court below was without jurisdiction of the subject matter involved the Order must be reversed. If the District Court had jurisdiction, to the extent that it had power *to decide whether a right secured by the Constitution had been impaired*, and decided that question erroneously, then the Order must, of course, likewise be reversed. In fact, this appears to be conceded by the Interborough's brief (page 9), where, immediately after contending that the Federal Courts have "jurisdiction," it is said:

> "Second. The plaintiff is *entitled in the Federal Courts to protection* against the enforcement of a confiscatory rate."

This is evident from the opinion in *Columbus Railway Co. v. Columbus*, 249 U. S. 399, cited by the Appellee, where it was held that although, on the allegations of the Complaint, the District Court had jurisdiction of the cause,

no Constitutional right had been impaired and that, accordingly, the Complaint, although alleging the essential jurisdictional facts, *was properly dismissed.*

In the case at bar, it appears from undisputed facts that no Federal right has been denied and it is, therefore, perhaps superfluous to consider whether or not the District Court had power to decide the case.

The Allegations of the Complaint Were Insufficient to Give Jurisdiction to the District Court.

It is suggested that the gratuitous statement of the Complaint that the plaintiff's property "is taken without due process of law" is sufficient to confer jurisdiction (Interborough brief, page 7). This, of course, is not the rule, since it constitutes merely the expression of a legal conclusion which must be supported by the *facts* alleged (*Des Moines* v. *Des Moines Railway Co.*, 214 U. S. 179, and other cases cited in our earlier brief at pages 88-92).

If the rule were otherwise, it would only be necessary for a plaintiff to file a Complaint containing such an allegation, without facts to support it, in order to give jurisdiction to the Federal Courts. But that allegation is analogous to allegations in Complaints in suits in State Courts to the effect that "the defendant is justly indebted to the plaintiff" for a particular sum and which, of course, will not sustain a cause of action unless otherwise alleged.

Nor is it true that jurisdiction necessarily depends upon the allegations of the Complaint, because, where the Federal question said to be involved is not substantial, or where consideration of it is precluded by previous decisions of this Court, the jurisdiction will not be sustained (*Salinger* v. *United States*, 272 U. S. 542, 544; *Norton* v. *Whiteside*, 239 U. S. 144, 146; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Farrell* v. *O'Brien*, 199 U. S. 89, 100).

The *Columbus* case, on which the plaintiff relies, does not hold otherwise. There *the Complaint alleged that the plaintiff's rates were limited by Ordinances* of the City of Columbus imposing confiscatory rates. This was recognized by the Court, which said (249 U. S. 407):

> "The theory *upon which the bill was framed* and the case argued here by the appellant *is that the grants were legislative in character.*"

The Complaint there did not allege the existence of any contracts *as such*. The question, whether or not the Ordinances were legislative, was held sufficient to give jurisdiction to the Federal Court notwithstanding that, when it appeared that the Ordinances were in their nature contractual, it was held that no Federal right had been denied.

In the case at bar, however, *the plaintiff sets forth the Contracts, as contracts, relating both to the Subways and the Elevated lines, and demands an injunction to restrain their enforcement.* Such an issue does not vest jurisdiction in the District Court (*Des Moines* v. *Des Moines Railway Co.*, *supra*, and other cases cited in our earlier brief at pages 88-92).

I.

It appears to be conceded that the interlocutory Order cannot be sustained, in so far as it enjoins the Commission and the City, as contractual parties to Contract 3 and the Certificate, from instituting judicial proceedings in the State Courts to enforce the Contracts.

We have shown in our earlier brief (pages 86-93) that the District Court had no power to enjoin the Commission and the City, as the contractual parties to Contract 3 and the Certificate, from enforcing those Contracts in the

State Courts. We have searched the Interborough's brief in vain for any attempt to refute that argument except the following at page 100:

> "The Commission's argument (pages 86-93) that those actions were merely judicial proceedings by one party to a contract to secure its enforcement is quite beside the point. The attempted institution of those actions *evidence* the prior adverse determination of the Commission upon the plaintiff's application."

If we correctly understand this contention, it implies the admission that judicial proceedings to secure the enforcement of the Contracts by the contracting parties could not be enjoined, but that an intention to institute such suits was "*evidence*" that the Commission in its *regulatory* capacity intended to take adverse action on the plaintiff's amendatory schedules.

This suggestion constitutes a complete reversal of the theory of *the Complaint*, of the *Interlocutory Order appealed from* and of the *Order in the ancillary suit* which restrained the State suits because an injunction against those suits was demanded *here* (*Supplemental* Record, pages 132-133). We submit that it involves a concession that the Order appealed from, to the extent at least that it enjoins judicial proceedings, must be reversed.

If the intention to institute the State suits were to be regarded merely as "evidence" of the Commission's intention to exercise its *legislative* powers in such a way as to prevent an increase in the fare, an altogether different question would be presented, assuming for the moment that the Court had power to enjoin the legislative functions of the Commission. But the *relief demanded* in the Complaint, the *relief granted* by the Interlocutory Order appealed from and the *relief granted* by the Order in the *ancillary* suit make such a contention impossible.

For an analysis of the relief *demanded* by the Complaint and *granted* by the Order we respectfully refer the Court to pages 76-79 of our earlier brief. It will there appear that the Complaint demands that both the Commission and the City *be enjoined from prosecuting any suit to enforce the Contracts*. By the Interlocutory Order appealed from, both the Commission and the City *are specifically enjoined from prosecuting any suit to enforce the Contracts* and by the Order in the ancillary suit they have been enjoined (*Supplemental* Record, pages 132-133) *from prosecuting those suits*, on the theory that an injunction against the prosecution of the State suits *was the very purpose of this suit*.

But not only does the Order appealed from *enjoin the prosecution of the State Court suits* and not only does the opinion of the Court show that this was the purpose intended to be attained,* but this follows conclusively from the fact that the City, which has no regulatory power whatever, is similarly enjoined. The *only* purpose, therefore, of any injunction *against the City* is to restrain *the enforcement of the Contracts by judicial proceedings*, since the City has no *regulatory* power over the rate. The *only* complaint against the City is its intention to institute these suits and the *only* relief granted or possible against the City is the Order restraining them. As to the City the State suits foreshadowed when this suit was begun *and which the City is restrained from prosecuting*, manifestly cannot be said to operate as "*evidence*" of an intent

* Note—This clearly appears from the opinion of the District Court, where it said (Record, page 187):

"The defendants actively invoke the aid of the State Court in enjoining the plaintiff from proceeding to enforce its rates."

Also (Record, page 190):

"The Commission did more than refuse to act. On February 18th rejecting the proposed new rates it instituted proceedings to forbid their operation."

The Court adding:

"A forced continuance of confiscatory rates amounts to a denial of due process of law."

on the part of the City to exercise a regulatory power which the City does not possess. The inclusion of *the City*, therefore, in the Prayer for Relief and its inclusion as a party against whom the injunction against prosecution of the State suits *is granted*, demonstrates at once the scope of the injunction and what its scope was intended to be.

Moreover, the allegations of the Complaint show (Record, pages 87, 33, 35, 78) that it proceeds on the theory that "*legal proceedings* to compel the continuance of the said confiscatory rate (i. e., the five-cent fare)" are contemplated by the City and on the theory that the Commission intends "to bring various *actions, suits and proceedings* against the plaintiff" to compel the continuance of the five cent fare. Accordingly, it is evident that it is the purpose of this suit to prevent the Commission and the City, as the *contractual* parties to Contract 3 and the Certificate, from enforcing those Contracts by judicial action in the State Courts.

Summarizing our contentions on this aspect of the case, we submit that the Appellee's new theory is wholly inadmissible because

1. The Complaint *alleges* the State suits and demands that they be enjoined;

2. The Interlocutory Order appealed from *restrains* the prosecution of the State suits both by the Commission and by the City;

3. The ancillary Order *restrains* the prosecution of the State suits *alone* on the theory that this is the relief intended to be secured in this, the principal, suit;

4. The City, which is also restrained from prosecuting the State suits, *has no regulatory power* concerning the exercise of which the State suits could be regarded as "evidence."

II.

The proceeding instituted by the Commission under Section 57 of the Public Service Commission Law was not to enforce any statute or order but was brought to require the Interborough Company, a public service corporation, to perform its contractual obligations to the City of New York and to its inhabitants.

The proceedings authorized by Section 57 of the Public Service Commission Law *are not limited to the enforcement of an Order of the Commission*, as the Appellee suggests (Interborough brief, pages 99-101), but are applicable to the enforcement of a *contract* obligation between a common carrier and a municipality. The "violation of law" which may be thus enjoined, it has repeatedly been held, may consist of the violation of the *legal obligation of a contract* and it is on that theory that the Petition under Section 57 (Record, pages 1362-1365) was framed.

The nature of such franchise contracts has been several times considered by the Courts of Appeals. It has been decided that *every inhabitant* of the City or Town intended to be benefitted by such contractual rate limitations can maintain a suit to enforce the franchise obligation.

> *Pond* v. *New Rochelle Water Co.*, 183 N. Y. 330.
> *Matter of International Railway Co.* v. *Rann*, 224 N. Y. 83.

Consistent with these principles, the Legislature by Section 57 imposed upon the Public Service Commission, as a public body, the duty *to enforce such contractual limitations*. The New York Courts have given effect to those principles and have decided that the Commission, as the representative of the public, may maintain proceedings under Section 57 to require a Public Utility to per-

form *contractual rate obligations* which it has assumed. A violation of the *legal* obligations of such a contract constitutes "a violation *of law*" which the Commission may institute proceedings to enjoin.

In *Wilcox* v. *Richmond Light & Railroad Co.*, 142 App. Div. 44, affd. 202 N. Y. 515, the Public Service Commission instituted suit to require the Richmond Light & Railroad Co. to perform a *contract* obligation contained in its franchise from the Village of New Brighton. It was contended by the defendant that the suit could not be maintained under Section 57 of the Public Service Commission Law because the act complained of—*the violation of a contract*—did not constitute "a violation of law." It was held that although the acts sought to be enjoined *were not violations of statutory law*, they constituted, nevertheless, violations *of contract* and, therefore, "violations of law." The Appellate Division, in an opinion *affirmed* in 202 N. Y. 515, said (pages 48-53):

> "The main issue on the merits raised by the defense is *whether the failure by the defendants to perform their charter obligation is a 'violation of law,' as that term is used in section 57.* • • •
>
> "Here the two charters *took the form of mutual agreements between the respective railroad companies and the village of New Brighton.* These agreements were duly executed by both parties, and were approved by appropriate ordinances or resolutions passed by the board of trustees of the village of New Brighton. • • • *Treated as contracts, sufficient obligations had moved to and from each party thereto. The inducement moving the public was the acquisition of transportation; the inducement to the trolley companies was the privilege of using public streets for purposes of transportation.* • • •
>
> "The defendants insist that the 'violation of law' upon which the Commission may act, under section

> 57, *involves only such offenses as are specifically mentioned in the* written *law*. Recognizing that the law prohibits certain acts and requires the doing of other acts, *the defendants claim that the jurisdiction of the Public Service Commissions extends only to such prohibitions or requirements as are found ipsissimis verbis* of some statute. * * * The only question in the case of prime importance is whether the failure of the defendants to interchange fares is a violation of law, which, in my opinion, has been established not only by reason but upon authority."

In the recent case of *Public Service Commission* v. *Westchester Street R. R. Co.*, 206 N. Y. 209, it was again held in an opinion by Hiscock, J., that the Public Service Commission might, under Section 57 of the Public Service Commission Law, proceed by injunction and mandamus to prevent the utility company from charging a fare greater than the fare provided in its *contract* with the municipality. It will be observed that it was recognized that the right sought to be enforced *was not statutory but was entirely contractual;* but it was nevertheless recognized that the violation of the contract constituted "a violation of law" under Section 57. The Court said at page 220:

> "The road cannot be operated without a franchise and the franchise consists in part of the modification. *If the appellant is operating its road in violation of its franchise and obligation, there is no doubt that it can be stopped by a proper proceeding at the instigation of a proper party, and such I think are the present ones.* (Public Service Law, Sec. 57)."

Examination of the Petition (Record, pages 1362-1365) shows that the "violation of law" which the Commission asked therein to be enjoined was not the violation of any *statutory* rate of fare or of any *Order*, but consisted of

a violation by the Interborough Company of the Contracts.

After alleging, in paragraphs 1 and 2 of the Petition (Record, page 1363) the nature of the parties, paragraph 3 proceeds:

> "That *under a contract, known as Contract No. 3*, made and entered into on March 19, 1913, by defendant and The City of New York, defendant is entitled to charge for a single fare upon the street railroads constituting the 'Subway Division' the sum of five (5) cents but not more."

With respect to the Elevated Lines, paragraph 4 of the Petition alleges:

> "That *under a contract made and arrived at on March 19, 1913, through the grant and acceptance of a certain Certificate* for the construction and operation of certain extensions to the Elevated street railroads owned by the Manhattan Railway Company and leased by it to defendant, which extension certificate was granted to defendant by the Public Service Commission for the First District and was accepted by defendant, defendant is entitled to charge for a single fare for each passenger in the same general direction over the Elevated street railroads comprising the 'Manhattan Division' the sum of five (5) cents but not more."

It is then alleged that the defendant is still operating *under the two Contracts* whose rate provisions have never been modified. By paragraphs 7, 8 and 9 it is alleged that the Interborough Company, in violation of the Contracts, has *threatened to increase the contractual rate of fare from five to seven cents*. Accordingly, it is alleged, that to permit the Interborough Company to charge a rate of fare in excess of the contractual rate would constitute a violation of law. Paragraph 11 alleges:

> "That the Transit Commission being of the opinion that said threatened act of the defendant *in fail-*

> *ing to charge only a five-cent fare and in charging a seven-cent fare will be contrary to law and in violation of law* has directed counsel to the Commission to commence an action or proceeding in the Supreme Court of the State of New York for the purpose of having *such* threatened violations stopped and prevented either by mandamus or injunction."

The Commission accordingly prays that a mandamus or injunction issue to restrain the Interborough Company from charging a fare in excess of the contractual five-cent fare, which, if increased, would constitute *a violation of the contract and, therefore, a violation of law.*

It is evident, therefore, that the proceeding under Section 57 of the Public Service Commission Law was instituted by the Commission as a *contract-enforcing body* to require the Interborough Company to comply with the fare stipulations of Contract 3 and of the Certificate. The statement, therefore, at pages 99-100 of the Interborough brief that the proceeding was instituted *"to punish* the Interborough Company for a violation of law" is without the slightest foundation.

In point of fact this statement is refuted by the Supplemental Complaint, which was filed *after* the institution of these suits and *after* the plaintiff was fully conversant with the nature of the suits. By paragraph XXXIV-d (Record, pages 132-133) it is alleged:

> "Thereafter and on the afternoon of February 14, 1928, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service, and the defendant The City of New York, contemporaneously undertook to bring two *civil* actions and a special summary *civil* proceeding, in the Supreme Court of the State of New York, County of New York."

If, moreover, we are correct in our contention that the Federal Courts have no power to restrain a State legislative body from exercising its legislative functions, it necessarily follows that they have no power *in advance* to restrain proceedings, *not yet instituted*, to enforce an Order, *not yet made*.

The Order, therefore, so far as the City is concerned, is indefensible and is not even defended by the Appellee. So far as the Commission is concerned the Order is equally indefensible in that it restrains the Commission in its *contractual* capacity from enforcing the Contracts by judicial proceedings in the State Courts.

We will now proceed to show that the Order cannot be sustained in so far as it *enjoins* the Commission from exercising its *legislative* functions under the Public Service Commission Law.

III.

Allegations that the Commission intended to act adversely on the Interborough's application for an increased fare do not, in the absence of action by the Commission previous to the institution of this suit, state a cause of action. Such functions are legislative and may not be enjoined on the theory that the legislative body intends to exercise them in an unconstitutional way.

The question thus presented is *not merely* a question of prematurity, as the plaintiff professes to believe (Interborough's brief, page 88). That question has arisen (*Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210) where *an Order of the Commission has already been made but some further legislative relief was available* which had not, however, been exhausted. That question, of course, is

present here, but the real question lies very much deeper than this and concerns the power of the District Court *to enjoin the exercise of the Commission's legislative functions*—on the plaintiff's application for an increase—on the theory that the Commission intended to exercise them in an unconstitutional way. The question here presented is whether the *intention* of a legislative body, however demonstrated, to enact a Statute or an Order which is challenged as unconstitutional, justifies the Federal Court in enjoining the exercise of the legislative functions thus involved.

We are not dealing here with *individual* action (to which other principles apply) but with action of a strictly *legislative* character. Such action cannot be enjoined. It is not sufficient to contend, as does the Appellee (Interborough brief, pages 94-100), that the Commission, by intellectual processes, had reached a mental conclusion on the question of its jurisdiction and that, accordingly, the Commission *intended* at the time of the institution of this suit to make an Order refusing jurisdiction over the rate.

These mental operations of the Commission, to which the Appellee attaches such importance, *had, of course, not the slightest effect upon the rate*. *Action* alone could do that, and Section 49 expressly provides what that action shall be. The Commission

> "shall fix the same the rate *by Order* to be served upon all common carriers * * * by whom such rates, fares and charges are *thereafter* to be observed."

Thus, and *only* thus, under the Law, could the Commission *act upon the rate*, and no mere cogitation would suffice. Not until an *Order* has been made in the case of a Commission and not until a Statute has been *enacted*

in the case of a Legislature can the rights of anyone be said to be impaired or any cause of action be said under any circumstances to arise.

The filing of the Supplemental Complaint for the *only* purpose of supplying facts which had not occurred when this suit was instituted is, moreover, a complete refutation of this argument. By that Complaint it is *affirmatively alleged that "the determination and Order" of the Commission was not made until after the institution of the suit.* Paragraph XXXIV b alleges (Record, pages 131-132):

> "*After the filing of the original bill of complaint in this Court* on February 14, 1928, at 9.20 o'clock in the forenoon of that day, and the attachment of the jurisdiction of this Court to the cause therein, and after the service of the *subpoena ad respondendum* on all parties defendant in said action, the defendants constituting the Transit Commission *convened at a special meeting* and, without hearing the plaintiff and without public notice, *made a determination and Order* purporting to reject, as unlawful, the tariff sheets referred to in the original bill of complaint and duly published, posted and filed by the plaintiff on February 1, 1928, *and to dismiss the said application of the plaintiff* to the said Transit Commission of February 1, 1928."

By the same paragraph it is further alleged that the Commission *at the same time*

> "*adopted a resolution* purporting to direct the counsel to the said Transit Commission to commence an action or proceeding in the Supreme Court, State of New York, in the name of the Commission, against the plaintiff Interborough Rapid Transit Company for the alleged purpose *of having the charging and collecting of a rate in excess of five (5) cents per passenger on each the Subway Division and the Manhattan Division stopped and prevented either by mandamus or injunction.*"

Accordingly, the plaintiff by its Supplemental Complaint demands (Record, page 138):

> "That it be adjudged and decreed that the plaintiff have similar relief in respect to *the Orders, acts and determinations* of the defendants constituting the Transit Commission, and the suits and proceedings brought or threatened to be brought by the defendants, or either of them, *which are set forth in this amended and supplemental complaint*, as in respect to the orders, acts, determinations, actions or proceedings which are set forth in the original complaint."

Thus, the pleadings in this suit, by which the plaintiff is *conclusively* bound, allege that at the time of the institution of the suit the Commission had not determined or taken any action with respect to the plaintiff's application.

The suggestion (Interborough's brief, page 95), that

> "in every substantial respect, the Transit Commission had rejected plaintiff's filed rates several days before the complaint herein was filed and nothing remained to be done but the mere formality of evidencing by a formal order the decision already made"

hardly requires extensive comment. It is sufficient to say that no *mental* operation, however complete, no *intent*, however demonstrated, could have the slightest influence on the rate of fare until "the mere formality" of the Order, *which under the Statute is the only method by which the Commission could act*, had been made. The plaintiff's argument when analyzed resolves itself into the contention that in every case where it can be shown that a legislative body *intends* to enact an unconstitutional Statute the Federal Courts *must* interfere. If that is true the previous decisions of this Court (see our earlier brief, pages 95-99)

must be considered overruled.* If a legislative body can be thus enjoined it may always be enjoined whenever it appears either from past experience or from the private or public utterances of legislators that the enactment of an unconstitutional Statute is contemplated. The mere purpose or intent will be sufficient to justify an injunction and the principle which this Court has firmly upheld to protect legislative bodies from judicial interference will definitely be overthrown.

There is, moreover, no necessity for judicial action until *after* the Statute, Ordinance or Order has been made. Thereafter any person whose rights have been impaired may protect himself by an injunction against the *enforcement* of the unconstitutional Act.

In *Gaines* v. *Thompson*, 7 Wall. 347, the Court applying this principle said at pages 352-353:

> "Certain powers and duties are confided to those officers, *and to them alone*, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, *there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action.* The reason for this is, that the law reposes this discretion in *him* for that occasion, *and not in the courts.* The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.
>
> "In the one case the officer is required to abandon his right to exercise his personal judgment, *and to substitute that of the court, by performing the act as it commands.* In the other he is forbidden to do the act which his judgment and dis-

* Note—In *Maynard* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483 (considered at page 92 of our earlier brief), it was alleged (page 487) that members of the Commission were "giving out" their intentions in "speeches and interviews."

> cretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction."

Similarly in *Manufacturers Railway Co. v. United States*, 246 U. S. 457, the Court said at pages 482-483:

> "It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates, and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions. *In effect, the District Court was asked to perform a function specifically conferred by law upon the Commission.* But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and *it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. Procter & Gamble Co. v. United States*, 225 U. S. 282, 292, *et seq.*"

To the same effect are *Oregon v. Hitchcock*, 202 U. S. 70; *United States v. Fletcher*, 147 U. S. 664, and *New Orleans v. Paine*, 147 U. S. 261.

At page 103 of the Interborough's brief appears a quotation from our earlier brief, in which it is said to be con

ceded that the Commission had acted *at the time of the institution of this suit*. This quotation from pages 119-120 of our earlier brief is taken from that part (Part I, Division II) which deals with the question of whether, *after the institution of this suit and at the present time*, any constitutional right of the plaintiff was impaired. It is plainly stated at page 85 of our earlier brief that the question to be considered in Division II of Part I of our brief was whether any right under the Constitution was impaired:

> "*Thereafter* [*after* the institution of this suit] by the refusal of the Commission to exercise a duty imposed by the Statutes of the State of New York, which, if exercised, would result in releasing the plaintiff from its contract obligations (*Divisions II*, III and IV of this part of our brief)."

Needless to say, we have always conceded, and now concede, that *after the institution of this suit* the Commission took action in its regulatory capacity but, upon familiar principles, that did not supply a cause of action that did not exist when this suit was brought (see our earlier brief, pages 104-108).

If We Assume that the Interborough Company Could Secure an Increased Fare by Filing Amendatory Schedules Under Section 29, it Would Have Required Affirmative Action by the Commission to Prevent Those Schedules from Becoming Effective on March 3, 1928, Which Action the District Court Had No Power to Enjoin

Let it be *assumed* for the moment that the Commission had jurisdiction over the rate and that the Interborough had, as it claims, "established" (Complaint, paragraph XXXIII a, Record, pages 39-40) an increased fare by filing amendatory schedules to that effect. Unless the Commission acted with respect to the schedules thus filed

they would become effective on March 3, 1928. The Interborough was not, therefore, under the necessity of securing *affirmative* action by the Commission. What it desired was *non-action*, because if the Commission did *not* act upon the schedules (under our present assumption) they would take effect on March 3rd. No "supplication" was necessary here (Interborough's brief, page 103). No undue "delay" was possible. What the plaintiff apprehended was *unfavorable action* on the schedules filed under Section 29 and for that reason the plaintiff instituted this suit to restrain the Commission from exercising the very jurisdiction which it had invoked on the theory that the jurisdiction might or would be improperly exercised.

It is suggested, however, that on account of the existence of Chapter 743 of the Laws of 1894 limiting the rate of fare to five cents on one section of the Elevated lines, a Federal question was presented, at least in this respect. At pages 94-95 of the Appellee's brief it is said:

> "Moreover, as to a substantial part of the elevated lines, the five-cent fare was imposed by the direct statutory requirement of Chapter 743 of the Laws of 1894, and it may be observed that the plaintiff's first cause of action is directed solely against that State action. The denial by the Commission of the plaintiff's applications in *1920* and *1922* constituted a fixation by the Commission of the five-cent fare as the rate for the future and hence was legislative action. The effect of the Commission's adverse action on plaintiff's *new schedules* filed under Section 29 was to compel plaintiff to continue the five-cent fare previously fixed."

Quite aside from the fact that no one has threatened or intends to enforce the provisions of this ancient Statute, which affects only one section of the Elevated lines, it

has been conceded by the Appellee that no application that the Commission could properly have entertained with respect to the Elevated lines was made by the Interborough until February, 1928 (see our earlier brief, page 53). The "denial" above referred to which occurred in *1920* related *only to the Subways*. The "denial" referred to which occurred in *1922* was at a time when, it is conceded, the Commission had no jurisdiction to change the contract rate. The "adverse action on plaintiff's new schedules filed in *1928* under Section 29" did not occur *until after the institution of this suit*.

IV.

In *Railroad and Warehouse Commission of Minnesota* v. *Duluth Street Railway*, 273 U. S. 625, and *Denney* v. *Pacific Telephone and Telegraph Company*, 276 U. S. 97 (both cited by the Appellee), the Commission had released the Utility from the Contract rate. The Utility having been released was no longer bound by Contract and could maintain suit in the Federal Court for a compensatory rate.

In the *Duluth case* the following facts, as stated in the opinion of this Court, appear:

> "The plaintiff, an existing street railway company, elected to comply with and come under the terms of Chapter 278, General Laws of Minnesota, 1921, by filing the declaration and consent required. Thereby it gained a right to apply to the above mentioned Commission to fix the rates of fare to be charged in place of the five cents to which it had been limited before it came in under the Act. It applied to the Commission; the City of Duluth was made a party; and after a hearing *the Commission determined the value of the plaintiff's property used and useful in the street car service in Duluth, found that a return of seven and one-half*

> *per cent. was a reasonable rate of return, and fixed the fares that we have stated as sufficient to yield that rate.* This was on July 13, 1922. Five days later the plaintiff filed this bill, setting up that the Commission's order was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States."

The Legislature of Minnesota had authorized the Utility to file a "Declaration and Consent" and had authorized the Commission thereupon to abrogate the contractual rate *by the substitution of a statutory rate.* Therefore, *after the Commission had acted by abrogating the contract rate,* the contract was terminated and the Utility was entitled to invoke the jurisdiction of the Federal Court. Thereafter the Utility, under the Minnesota statute, was in the same position with respect to *the substituted statutory rate* as if no contract had previously existed, for *the contractual rate had been abrogated* under the police power of the State.

It was contended by the City, however, that the Utility was required to proceed in the State Courts against the statutory rate by an appeal which the statute authorized, although it did not limit the Utility to such an appeal. It was contended that although the franchise contract *had been terminated,* there still *remained* an implied contract to apply only to the State Courts for relief and *that is the hypothetical "contract" which is referred to in the excerpt from the opinion of Mr. Justice Holmes which is quoted at pages 86 and 87 of the Appellee's brief:*

> "The argument that the plaintiff is barred *by contract* needs but a word. We will assume for the purposes of decision that the plaintiff *by coming in under the State law made a contract,* and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to

> say that it did more than adopt that method in its general character and with its ordinary incidents. If, *apart from the supposed contract,* a party would have been entitled to go to the Court of the United States at the stage when the plaintiff went there, no reasonable interpretation of the contract forbade the plaintiff to go, and there is no need to consider whether the contract could have forbidden it if it had tried."

The *Duluth case* would, indeed, be similar to the case at bar if, *without filing the "Declaration and Consent" required by the Minnesota statute and without securing an Order by the Commission releasing it from the contract,* the Utility had instituted suit in the Federal Court for a rate in excess of its franchise rate and to enjoin the Commission from exercising its jurisdiction under that statute as the Plaintiff has done here. The contention would *then* have been unanswerable, as it is unanswerable here, that only by following the procedure prescribed by the statute under which the plaintiff is asking for relief, may the plaintiff secure relief from its contract rate.

In the *Denney* case a similar situation existed. There the Utility companies had operated under franchise contracts prescribing maximum permissible rates. The Public Service Commission Law of the State of Washington contained the following provision:

> *"The commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated* by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order."

Under the authority thus vested in the Commission in 1919 *the Commission terminated the contract rates.* It thereby exercised the police power of the State to destroy

the contract and then, under its regulatory powers, it substituted *statutory* rates for the *contract* rates. The appellants contended that notwithstanding that the State had thus terminated the contract, it remained in effect. It was held that the contract *had been terminated by the Commission* under the police power of the State and was consequently terminated for every purpose. The Court said that *the Order of the Commission:*

> "*was sufficient to terminate the provisions of the franchises as to maximum rates*, within the purview of section 55, supra. The department made its investigation and order without regard to the franchise rates and treated the question presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action."

Quoting with approval from the decision in *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, this Court said:

> "Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order *specifically* declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, *upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company*, and considering the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that *the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import.* That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

It will be immediately perceived that what the Commission did in the *Duluth case* and in the *Denney case—to terminate the contract rate under the police power of the State—is precisely what the Commission has declined to do in the case at bar.* Here the Commission (although after the institution of this suit) dismissed the plaintiff's application for an increased fare and refused (whether rightly or wrongly, is immaterial here) to terminate the contract as the plaintiff had requested that it do.

It would be extraordinary, indeed, if the plaintiff, *entitled only to relief from its Contracts under the Public Service Commission Law* and entitled to relief on no other theory (assuming that it was entitled to relief at all), could repudiate the only method by which such relief may be secured by enjoining action by the very Agency established for that purpose (see our earlier brief, pages 101-103).

V.

The plaintiff may not proceed against the Orders made by the Commission in 1920 and 1922.

It is suggested (Interborough Brief, pages 101-103) that the plaintiff may disregard its own application made to the Commission on February 1, 1928, and may proceed directly against the Orders made by the Commission in 1920 or in 1922 which denied the plaintiff's application for an increased fare. On this aspect of the case we particularly refer to the Statement of Facts contained in our earlier brief (pages 46-47, 50-54 and 59-63).

It Has Been Conceded by the Appellee that the Commission Had No Jurisdiction to Grant the Application for an Increase Made in 1922.

We eliminate at once the refusal of the Commission to increase the fare in 1922 both on the Subway and Ele-

vated Lines because the Amendment (Chapter 153, Laws of 1922) to Section 49, at that time in effect, expressly *prohibited* the Commission from increasing the rate of fare. In fact, *it was conceded by the Appellee* (see our earlier brief, page 53) that the Commission could not, on any possible theory, have entertained that application.

The Plaintiff Could Not in 1928 Proceed Against the Order of the Commission Upon Its Application Made in 1920.

There are many answers to this contention.*

(1). The schedules, cancelling its earlier schedules, voluntarily filed by the plaintiff in 1925 at a five-cent fare.

(2). The Interlocutory Order is not limited to the Order made by the Commission in 1920, and if so limited would be entirely ineffective.

(3). The absence of any evidence that the fare on the Subway lines in 1920 was confiscatory.

(4). The effect of the Amendment enacted in 1922 to Section 49.

(5). The institution by the plaintiff, and its subsequent abandonment, of *Certiorari* proceedings in the State Courts.

(1).

The Schedules Voluntarily Filed by the Plaintiff in 1925 at a Five Cent Fare.

Let it be assumed for the moment that the plaintiff's application in 1920 was improperly denied by the Commission and consider the effect thereon of the new schedules, *voluntarily filed by the plaintiff in 1925, at a five cent rate of fare.*

* Note—The attention of the Court is directed to the fact that the considerations contained in Divisions 2-4, inclusive, of Part I of our earlier brief (pages 109-141) are fully applicable to the denial by the Commission of the Interborough Company's applications both of 1920 and 1922 whereby the Contract remained in effect and *binding on the parties*

After the plaintiff filed its new schedules in 1925 the rate (*aside* from the Contracts) was established by the schedules thus filed *and not by any previous action of the Commission*. The earlier schedules, as the plaintiff *alleges*, were "*cancelled*" (Complaint, Par. XVI (f) and (g), Record pages 24-25) by the schedules filed in 1925 (see our earlier brief, pages 59-61)). At the time the plaintiff filed its new schedules in 1925 it could (*except* for its Contract obligations) have posted any rate it pleased, no matter how high or how low that rate might be, subject, of course, to action by the Commission thereon under Sections 29 and 49. This the plaintiff could have done regardless of any previous Order of the Commission with respect to earlier schedules. The plaintiff elected, however, to file its schedules in 1925 at a five-cent rate and this was done consistent with its statement (Record, page 1200) that

> **"a public announcement was made that *it was the purpose of the Company to carry out the Contracts with the City without change and without further request for change*."**

(2).

The Interlocutory Order Is Not Limited to the Order Made by the Commission in 1920, and If so Limited Would Be Entirely Ineffective.

The Order appealed from, moreover, is not limited to an injunction directed to the Order of the Commission made in 1920 and which is applicable only to the Subways (Record, pages 2000-2001). If it were thus limited it would be without effect even as to those Subway lines.

Section 33 provides that

> "No common carrier shall charge * * * a greater or less or different compensation * * * than the rates, fares and charges * * * ***specified in its schedules filed and in effect at the time***."

Here "the schedules filed and in effect at the time" (February 1, 1928) were the schedules filed in 1925 (Complaint, Par. XVI, (g), Record, page 25) which had *"cancelled"* all earlier schedules and under which (*aside* from the Contracts) the five-cent rate of fare on the Subway and Elevated lines was "fixed and prescribed" by the plaintiff, as the plaintiff itself concedes (Record, page 25; also pages 39-40). No possible action either by the Commission or the Court annulling, modifying or vacating the Commission's Order of 1920 or the schedules there under consideration, would affect the rate under which the Interborough Company was operating its lines on February 1, 1928, *because the Order of 1920 and the schedules to which it was applicable were not effective after 1925.**

(3)

The Absence of Any Evidence that the Fare on the Subway Lines in 1920 Was Confiscatory

The plaintiff's application of 1920 related to the *Subway* lines and to those alone (see our earlier brief, pages 46-47). The Complaint does not allege what were the earnings either on the Subway or Elevated lines in 1920 or whether they were inadequate or highly compensatory (Record, pages 70-71, relating to the Subways; pages 27-28, relating to the Elevated; pages 82-85, relating to the Subways and the Elevated combined). The alleged return and the alleged value of the investment on which the plaintiff claims to be entitled to earn a fair return are only given from *1921* and the Court is left to speculate what the return or the value of the investment previously may have been.

* Note—This consideration, applicable even where the carrier is not under contract with respect to the rate (*Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210), is conclusive where, as here, the carrier may only secure relief from the contractual rate under the Statute and in the manner which the Statute prescribes (see pages 191-193 of our earlier brief).

It does not answer this objection to contend that the Commission refused the application in 1920 on the ground that it considered itself without jurisdiction over the contractual rate. Unless the rate which the Commission thus refused to modify in 1920 *is shown to be in fact confiscatory* the plaintiff cannot enjoin the Order which continued that rate in effect. The *reason* (assuming that reason to have been without foundation) that animated the Commission in refusing the plaintiff's application for an increase does not supply a cause of action if the rate, in fact, was a compensatory one. The *theory* on which the Commission acted is immaterial unless its action impaired some Constitutional right.

(4).

The Effect of the Amendment Enacted in 1922 to Section 49.

Whatever may have been the rights of the Interborough Company with respect to the action of the Commission taken in 1920 they clearly terminated when in 1922 the Legislature enacted the "Proviso" of that year which withdrew the Contracts from any jurisdiction that the Commission may have had as the result of the Amendment to Section 49 enacted in 1921 or previously. After the Amendment of 1922 the Commission *concededly* had no jurisdiction over the contractual rate of fare and it would be anomalous to hold that the Court could revive a right which the Legislature had previously expressly extinguished. The effect of the legislation of 1922 on the rights of the plaintiff may be demonstrated by considering the result if the plaintiff had attempted to challenge the Commission's Order of 1920 while the "Proviso" of 1922 was in effect.

(5).

The Institution by the Plaintiff, and Its Subsequent Abandonment, of Certiorari Proceedings in the State Courts.

After the Commission in 1920 had denied the plaintiff's application, the plaintiff instituted Certiorari proceedings in the State Courts of New York State and then, undoubtedly convinced that the Commission was justified in refusing jurisdiction, discontinued those proceedings (see our earlier brief, pages 46, 47). Disregarding for the moment the question whether the dismissal of those proceedings constitutes *res adjudicata* on the questions presented here, it is perfectly evident that the plaintiff's action in electing to institute proceedings to review the action of the Commission *in the State Courts* precludes the plaintiff from reviewing, *after eight years*, the identical question in the Courts of the United States.

VI.

The plaintiff effectively contracted away its constitutional right to a compensatory rate when it executed contracts which are binding on the parties. The indispensable element of an effective contract is the inability of the parties to recede from it, not the absence of State control over the contractual rate.

In Divisions II, III and IV of Part I of our earlier brief we dealt fully with this subject, and it is only necessary now to consider the Appellee's contentions with respect thereto. In order that the issue may clearly appear we set forth such extracts from its brief (italics ours) as seem to bear upon this question.

At page 9 it is said:

> "This right [to fair compensation] is subject to but one qualification. If a utility has by contract

effectively bargained away its right to a compensatory rate, it is not entitled to protection against confiscation. To have such effect, however, *the contract in question must have been duly authorized by the State.*"

At page 13 it is said:

"The question is whether, in view of existing applicable legislation, they had authority to make an *effective* contract for an inflexible fare."

Again at page 25 it is said:

"The result of all of the decisions of the New York Court of Appeals under the Public Service Commissions Law is that no statute authorizing the making of a contract between a municipality and a utility as to a rate or fare may be deemed after the passage of that law to authorize a contract for an unchangeable rate or fare, and therefore that no such contract made after that law may be deemed *effectively* to provide for an unchangeable rate or fare."

At page 40 it is said:

"It was still competent after 1907 for a municipality in granting a franchise to, or making a contract with, a utility, to insert a provision regarding the fare. But such a contract, after 1907, could not *effectively* establish a permanent fare. It does not detract from the usefulness of a contract as a method of fixing an initial fare, which may persist until through changing conditions it becomes either too low or too high, to deny to it an effect which would bar both the utility and the municipality from then insisting that it has ceased to be reasonable."

We have thus fully transcribed the contention of the Appellee on this aspect of the case in order to exhibit the

more clearly where the issue lies. That issue lies in the adroit and ambiguous use of the word "*effectively*" as it is employed by the Appellee.

It is seen at once that much depends upon the meaning of the word "effectively." Does it mean a contract which shall be "effective" to prevent regulation *by the State*, or does it mean "effective" to establish a contract *between the parties* which may be *subject* to regulation by the State or by the Commission to which the State has delegated its regulatory power?

If the Appellee, by the word "effective," means that in order that the Contract shall bind *the parties* it must also bind *the State*, its contention is not only unfounded in principle but is in direct opposition to the decisions of this Court, of the Courts of New York State and of the Courts of every other State where the question has arisen. This appears, however, to be the contention here because it is stated (Interborough brief, page 9) that "to have such effect the Contract in question *must have been duly authorized by the State*," and again, it is said (Interborough brief, page 26), "*the question is whether the Legislature has authorized* a contract for a permanent fare."

In Order that a Utility May Effectively Contract Away its Right to a Compensatory Rate it is Not Necessary that the Contract Shall Have Been Authorized by or be Binding on the State.

In order to elucidate this question we summarize as follows the various classes of rate contracts that have been the subject of judicial consideration.

(1) Such contracts, in order to be binding *on the State*, must have been authorized *by the State*. If not thus authorized, they are not binding *on the State*.

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 211 U. S. 265.

Louisville & Nashville R. R. v. *Mottley*, 219 U. S. 467.

Producers Transportation Co. v. *Railroad Commission of California*, 251 U. S. 228.

Union Dry Goods Co. v. *Georgia Public Service Commission*, 248 U. S. 372.

If such contracts are authorized *by the State*, they are binding *on the State* and the obligations imposed thereby are entitled to protection under Section 10 of Article I of the Constitution of the United States.

Cleveland v. *Cleveland City Railway Co.*, 194 U. S. 517.

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 211 U. S. 265.

Vicksburg v. *Vicksburg Water Works Co.*, 206 U. S. 496.

Detroit v. *Detroit Citizens Railway Co.*, 184 U. S. 368.

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S. 558.

Superior Water, Light & Power Co. v. *City of Superior*, 263 U. S. 125.

St. Cloud Public Service Co. v. *City of St. Cloud*, 265 U. S. 352.

Georgia R. & Power Co. v. *Decatur*, 262 U. S. 432.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650.

(2) But such contracts, *like all other contracts*, are binding on *the parties*, even though not authorized by the State, until the Legislature, or a Commission to which it

has delegated its police power, *acts, and by Order* abrogates the contract.

Southern Utilities Co. v. *Palatka*, 268 U. S. 232.
Opelika v. *Opelika Sewer Co.*, 265 U. S. 215.
Henderson Water Co. v. *Corporation Commission*, 269 U. S. 278.
Wichita Railroad & Light Co. v. *Public Utilities Commission of Kansas* 260 U. S. 48.
People ex rel. New York, Westchester & Boston Railway Co. v. *Public Service Commission*, 193 App. Div. 445 (aff'd 230 N. Y. 604).
City of Buffalo v. *Frontier Telephone Co.*, 203 N. Y. 589.
City of Manitowoc v. *Manitowoc & Northern Traction Co.*, 145 Wis. 13 (cited and quoted with approval by this Court in *Milwaukee Electric Railway & Light Co.* v. *Railroad Commission*, 238 U. S. 174).
Monroe (City of) v. *Detroit M. & T. Short Line R. Co.*, 187 Mich. 364.
Lanawee County Gas & Electric Co. v. *City of Adrian*, 209 Mich. 52.
Henrici v. *South Feather Land Co.*, 177 Cal. 442.
Southern Pacific Co. v. *Spring Valley Water Co.*, 173 Cal. 291.
Salt Lake City et al. v. *Utah Light & Traction Co.*, 52 Utah 476.
Traverse City v. *Michigan Railroad Commission*, 202 Mich. 573.

The *only* difference between rate contracts and other contracts is that, on account of the public interest involved, the Legislature or a Commission may impair the obligation of such contracts (when not authorized by the State), as other contracts could not be impaired. But legislative authority is no more necessary *to bind the parties* to a stipulated rate than it is necessary that an ordinary contract for personal services shall be authorized by Statute.

These authorities, which establish that a contract, *although unauthorized by legislation* and therefore subject to regulation by the State is nevertheless binding on *the parties*, are fully considered at pages 121-135 of our earlier brief. In almost all those cases the contract in question between the Municipality and the Utility was challenged on account of the existence of a Public Service Commission Law substantially identical with the New York Statute. It was nevertheless held that *until the Commission had acted and changed the rate, the contracts were binding on the parties.*

(3) Such rate contracts, however, *like all other contracts*, may be forbidden by positive statutory enactment and may, therefore, be *illegal*. In that event, like all other contracts, they are not binding even on the parties and in legal contemplation are as void as if they had not been made. Such was the statutory *prohibition* in

Southern Iowa Electric Co. v. *Chariton*, 255 U. S. 539;

San Antonio v. *San Antonio Public Service Co.*, 255 U. S. 547,

considered at pages 137-141 of our earlier brief.

(4) Finally, it follows that if the Legislature authorizes a contract, even though it is expressly provided that it shall at all times be *subject* to modification by Commission Order, that contract *binds the parties* until the Commission intervenes and by Order abrogates the contract rate. This is the effect attributed to the Rapid Transit Act and the Public Service Commission Law by the plaintiff in the Complaint, *both* with respect to the Certificate and to Contract 3 (Record, page 37 and page 51).

The District Court, however, although holding that the Contracts were "*subject* to the regulatory law" (Record,

page 1990) and "*subject* to the Commission's regulation" (Record, page 1990), erroneously held (Record, page 1990) that *because the Contracts did not "suspend the police power of the State over rates" they were not binding on the parties* (Record, page 1990). This, as we have shown in our earlier brief and as the authorities above referred to will show, discloses a complete misconception of the principles applicable to such a case—that a rate contract, *precisely like any other contract*, is binding on the parties until the State has interposed and exercised its paramount authority to abrogate the contract rate.

VII.

The Public Service Commission Law does not prohibit private contracts with respect to rates. In this respect the *Chariton case*, where regulatory powers were vested in the City which it was expressly forbidden to curtail by contract, and the *San Antonio case*, are wholly inapplicable.

The Appellee refers extensively to the *Chariton* and *San Antonio* cases and contends that (Interborough brief, page 26):

> "Such a contract [the Contracts here] was at least as clearly prohibited by the Public Service Commissions Law as were the contracts involved in the *Chariton* and *San Antonio* cases."

Again it is said (Interborough brief, page 77):

> "We submit that it is plain that the Public Service Commissions Law precludes *a finding of legislative authority* for the insertion in any contract made after its enactment of a provision for a permanent fare, and that the provisions of the Rapid Transit Act did not furnish such legislative authority. It accordingly follows that under the decisions of this Court in such cases as *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539, and *San Antonio*

> v. *San Antonio Public Service Company*, 255 U. S. 547, the plaintiff has not bargained away its right to a compensatory fare."

Referring to the legislative policy said to be embodied in the Public Service Commission Law, it is contended (Interborough brief, page 43):

> "Contracts inconsistent with the legislative policy, by which rates were to be just and reasonable alike for carriers and the public, *were prohibited*. This is *manifest* from the decisions of the Court of Appeals of New York, above cited, with respect to contracts made pursuant to Section 18 of Article III of the Constitution [of New York State] and the Greater New York Charter and other statutes which had prior to 1907 authorized contracts for rates or fares."

This contention involves a complete misconception of the effect of the Public Service Commission Law. That Law, unlike the statutory and constitutional provisions considered in the *Chariton* and *San Antonio* cases, *contains not a single provision invalidating private contracts with respect to rates*. It set up the machinery for *regulating* rates or, as was stated in the *Nixon* case, "a superintending agency of Government" (page 359). It did not prescribe any rate, but in compliance with fundamental requirements of constitutional law it established for the Commission which it created *the principles which the Commission should apply*. The utmost that can be said of the Statute and the public policy it represents is that rate contracts should at all times be subject to the jurisdiction of the Commission and that in exercising that jurisdiction the Commission should apply the standard of reasonableness prescribed. This interpretation of the statute is unconsciously expressed by the Appellee when, throughout

its brief, it refers to the Statute as declaring a policy of "state-wide *regulation.*" There is no suggestion in the Statute (as there was in the Statutes involved in the *Charlton case* and in the *San Antonio case*) that private contracts are invalidated or prohibited, but only that they are *subject to regulation by the Commission* precisely as, before the enactment of the Statute, they were subject to regulation *by the Legislature*. Nor was it necessary to proceed further than this, for this gave the Commission every power necessary for a complete regulation of rates whether those rates were established by *private* contract or were non-contractual.

The obvious purpose of the Statute is demonstrated by an examination of the system by which rates are to be regulated. They are not regulated by the standard *which the Legislature directed the Commission to apply*, because, if they were, it would not have been necessary to have delegated to the Commission jurisdiction over rates. *The Commission would have been useless and superfluous*. A mere declaration that all rates should be reasonable would have been sufficient (still assuming the Appellee's contention) to automatically require utility corporations to charge, and consumers or passengers to pay, a rate which was neither more nor less than reasonable. The whole question of rates, contractual or otherwise, would then have been thrown into the State or Federal Courts for adjudication, with inconsistent verdicts in each case (see our earlier brief, pages 124-126), as will occur if the plaintiff should succeed here.*

The Legislature fortunately did not establish a system that would necessarily have resulted in "confusion worse confounded." Instead it set up a Commission

* Note—It was for this reason, among others, that such provisions in the Public Service Commission Law of Kentucky were held not to be "self executing" in *McCheord v. Louisville & Nashville R. R. Co.*, 183 U. S. 483, pages 495-496, and that, accordingly, final action by the Commission was necessary before the Court could interfere.

with jurisdiction over rates, declaring, as was necessary, the regulatory principles which should be applied. Carriers were required to file schedules of the rates to be charged in the future (Section 28), the *form* of which the Commission might prescribe. Having filed its rates, the carrier might not charge "a greater or less or different compensation * * * than the rates * * * *specified in its schedules filed and in effect at the time.*" From time to time (in cases properly within its jurisdiction and in the absence of contract) the carrier might file amendatory schedules under Section 29, over which, by the express terms of that Section, *the Commission was given complete control.* By Section 49 general authority was vested in the Commission *to exercise jurisdiction over rates.* Under that section the public could, in any proper case, apply for a revision of the rate. The carrier also, in a proper case, might apply to the Commission or the Commission could act upon its own initiative. If the Commission should fail to act upon a schedule filed, in a proper case, under Section 29 the rate would take effect in thirty days, the new schedule superseding the old, and if the Commission acted to reduce the rate thus proposed *the Commission's Order would fix the new rate.* Similarly under Section 49, whatever the determination of the proceedings might be, *the Commission's Order would fix the rate.*

In making its determination with respect to the rate to be charged under Sections 29 or 49 the Legislature, consistent with constitutional principles, declared the standard to be applied *by the Commission* and that standard was, of course, the standard of reasonableness, but, as if to preclude the contention now suggested by the Appellee, it provided in the same Section (Section 26) that the carrier *might not charge*

Van Patten v C N & H P Co
81 Fed 544 Shiras
71 Pa Abstract Co 204/426

> *"more than allowed by law* or by Order of the Commission having jurisdiction and made as authorized by this chapter."*

Instead of providing, as the Appellee suggests, that any rate less than a reasonable rate was "prohibited," it provided exactly the contrary. It provided by Section 26 that any rate

> *"in excess of that allowed by law* or by Order of the Commission is prohibited."*

The public policy which the Statute represents was that any rate *"in excess"* of that allowed *"by Order of the Commission is prohibited."* Not the vague and variable "standard of reasonableness" but *the Order of the Commission* binds all concerned unless modified on *direct* appeal on Certiorari. If the rate becomes unreasonable the carrier *may not thereupon ignore the Order of the Commission or its Schedules in effect at that time,* but must secure relief from the Commission, if at all. Only if the carrier has not relinquished its Constitutional right to a compensatory rate may it then appeal for the protection of that right to a Federal Court, but if, as here, *it has relinquished its Constitutional right*, only its Statutory right remains.

The contention of the Appellee and its grotesque results may be tested by assuming a case where the *contractual* rate is unreasonably *high* and where accordingly no Constitutional right is involved. Will it be contended that such a contractual rate between a Municipality and a Utility which has been sustained by the Commission may be disregarded by shippers, passengers or consumers on the theory that the rate is void because in violation of the public policy that rates shall be "reasonable" re-

---

* Note—The rate "allowed by law" relates to the rate specified in the "schedules filed and in effect at the time" (Section 23).

gardless of the Order of the Commission sustaining such a rate?

The *Nixon case*, to which the Appellee refers as having "manifestly" established this principle (Interborough brief, page 43), manifestly does not do so. There *a writ of prohibition* had been granted, restraining the Commission *from exercising jurisdiction over the contract rate*. The question thus presented was not what the effect of action by the Commission, or of its refusal to act might be, *but whether the Commission had jurisdiction* to regulate the rate.

The opinion in the *Nixon case*, however, is replete with evidence that the Court did not entertain the slightest doubt that the contract was valid *between the parties*, even though it was *subject to the jurisdiction of the Commission*. At page 359 the Court said:

> "The State through its delegate, *the Commission*, would *lower* the charges if too high. *It* would *raise* them if too low * * *. A *superintending* agency of government had taken the matter in hand."

Again at page 361:

> "*The Commission* is now holding the City to terms which were accepted by implication when the conditions were imposed."

Finally and most conclusively the Court, in conclusion, said at page 362:

> "In deciding this case we put our ruling upon the single ground that the franchise contract of October, 1912, was *subject* to the statute and by the statute may now be *changed*."

Similarly in the *Quinby case* the Court, summarizing the earlier authorities on this question, said (pages 259-260):

> "The power of the local authorities to impose as a condition to giving consent to the construction

and operation of a street railroad *that a stipulated rate of fare should be charged has been repeatedly upheld* (*People ex rel. West Side St. R. Co.* v. *Barnard*, 110 N. Y. 548; *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377, 391, 392; *Public Service Commission* v. *Westchester St. R. R. Co.*, 206 N. Y. 209; *People ex rel. Frontier Elec. Ry. Co.* v. *City of North Tonawanda*, 70 Misc. Rep. 91; *Allegheny City* v. *Millville, A. & S. S. Ry. Co.*, 159 Pa. St. 411)."

It was therefore held that such contract rates agreed upon previous to the enactment of the Law would not even be subjected to the Commission *"for revision"* (page 264).

We have already shown that there is no provision in the Public Service Commission Law invalidating private contracts, although such a provision would certainly be expected if that had been intended. In this respect the Statute here is the exact *converse* of the statute under consideration in the *Chariton case, where regulatory power over utilities was vested in the City*, and it was further provided that

> *"These* (regulatory) *powers shall not be abridged by ordinance, resolution or contract."*

This, of course, expressly *invalidated* any contract with respect to rates. It had been so decided by the State Courts and that decision was followed by this Court (see our earlier brief, pages 137-138). The following statement concerning the *Chariton case* at page 11 of the Interborough brief is therefore not correct:

> "This Court therefore held *that in the absence of State authority permitting a contract for an unalterable rate*, the utilities involved could not have contracted away their right to be protected against the enforcement by the municipality of confiscatory rates albeit contained in a franchise which would otherwise have had the effect of a contract."

One of the reasons the provision *invalidating all rate contracts* considered in the *Chariton case* is not to be found here is that the conditions there differed entirely from the conditions here. In the *Chariton case* regulatory power had been vested by the Legislature *in the City* for the purpose of being exercised and the Legislature, *to prevent the City from curtailing these regulatory powers,* had forbidden any contract with respect to rates. Such a contract, if permissible to the City, would at least have bound *the City* even if it did not bind the State and, since the City had been entrusted with *regulatory* functions which were intended to be exercised, the Legislature *forbade these regulatory powers to be frustrated by contractual limitations.* In the case at bar, however, *the Cities of the State have no regulatory powers* over rates and the powers of the Commission (a State agency) would not be frustrated or curtailed by private contracts between a City and a Utility which would still remain subject to its jurisdiction. It was, therefore, unnecessary and would have been inappropriate to provide that no such private contracts should be made.

The same distinction is applicable to the *San Antonio case* (see our earlier brief, pages 138-140), where the Texas Constitution, vesting regulatory powers *in the Legislature, expressly prohibited contracts with respect to rates.* Here again this was eminently appropriate where the people of the State intended the Legislature (or municipalities) not to abdicate regulatory functions by any contract with respect to rates which would have that effect. In fact, twice previously during the life of the "contract" the City—the other party—had exercised its *regulatory* powers by the enactment of Ordinances *inconsistent* with the rate provisions of the "contract."

The distinction, therefore, between the *Chariton case* and the *San Antonio case,* in which, in the one case the

Statute, in the other the Texas Constitution, *contained express prohibitions* against a contract rate is manifest, and the reason for the prohibition in that Statute and in that Constitution, as well as *the absence* of any similar prohibition in the Public Service Commission Law, is thus self-evident. The distinction, moreover, is illustrated in the *Opelika case*, to which full reference is made at pages 139-140 of our earlier brief, and in the *Palatka case* where the *Charlton case* and the *San Antonio case* are distinguished by this Court (see our earlier brief, page 122).

It is Settled by Uniform Authority that a Rate Contract, Although Not Authorized by Legislation, is Binding on the Parties, Notwithstanding the Existence of a Public Service Commission Law, Until the Commission has Interposed and Changed the Contract Rate.

In the following cases, considered at pages 126-135 of our earlier brief, it has been uniformly held that parties to such contracts, *notwithstanding the existence of a Public Service Commission Law* providing for reasonable rates, cannot avoid their contractual obligations unless the Commission, under the paramount authority of the State, has terminated the contract rate. *For obvious reasons none of these authorities are referred to in the Appellee's brief.*

Cases in this Court:

Henderson Water Co. v. Corporation Commission, 269 U. S. 278.

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas, 260 U. S. 48.

Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612.

City of Manitowoc v. *Manitowoc & Northern Traction Co.*, 145 Wis. 13, quoted with approval by this Court in *Milwaukee Electric Railway & Light Co.* v. *Railroad Commission*, 238 U. S. 174.

Cases in State Courts:

Monroe v. *Detroit M. & T. Short Line R. Co.*, 187 Mich. 364.

Lanawee County Gas & Electric Co. v. *City of Adrian*, 209 Mich. 52.

Henrici v. *South Feather Land Co.*, 177 Cal. 442.

Southern Pacific Co. v. *Spring Valley Water Co.*, 173 Cal. 291.

Salt Lake City et al. v. *Utah Light & Traction Co.*, 52 Utah 476.

Traverse City v. *Michigan Railroad Commission*, 202 Mich. 575.

And in the Courts of New York State:

People ex rel. New York, Westchester & Boston Ry. Co. v. *Public Service Commission*, 193 App. Div. 445 (aff'd 230 N. Y. 604), 453, 454.

City of Buffalo v. *Frontier Telephone Co.*, 203 N. Y. 589.

It remains to consider two leading decisions of this Court referred to in our earlier brief.

Henderson Water Co. v. *Corporation Commission*, 269 U. S. 278.

Wichita Railroad & Light Co. v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48.

The *Henderson case* is attempted to be distinguished at pages 81-82 of the Interborough brief. It is said that the State Court had previously held that the contract under consideration there *was subject to the jurisdiction of the Commission* and that, therefore, "there could have been no contention that the contract rates governed." *That*

is precisely why the case was identical with the Nixon case but it was nevertheless held that even though the contract was subject to the jurisdiction of the Commission the Utility had no constitutional right to a rate in excess of the contract rate, and that, accordingly, it "was not entitled to any *judicial* relief from this situation however inadequate the rates." This Court decided, therefore, that the Commission, which had slightly but not sufficiently increased the rate, as it was alleged, *could impose whatever terms it saw fit* as a condition of the increase of the contract rate and that no Federal right was impaired thereby. The Commission had, in fact, imposed the condition that the Utility should operate under the increased but non-compensatory rate for a period of six months, which, of course, it could not have done unless the Utility had been operating under a contractual rate. This is precisely what the Court meant when it observed that

> *"only by securing the waiver of the franchise rates by Order of the Corporation Commission speaking for the State* did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates."

The same question was decided by this Court in the *Wichita case*, which arose under the Public Utilities Law of Kansas. *It was there held that a Utility was bound by its contract* (although that contract had not been authorized by legislation) *until it was released in exact accordance with the statutory procedure.*

By Section 13 of that Law (corresponding to Section 49 of the Public Service Commission Law) *it was provided that if the Commission should find that prevailing rates were unjust or unreasonable it should fix and substitute therefor reasonable rates.* By Section 20 of that Law

(corresponding to Section 29 of the Public Service Commission Law) it was provided:

> "No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any public utility or common carrier, *without the consent of the commission*, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection."

The Wichita Railroad Company of West Virginia, an electric street railroad and light furnishing company, had entered into *a contract* for the purchase of electrical energy at specified rates from the Kansas Gas & Electric Company. After the execution of the contract the Kansas Company filed a petition *under Section 20* with the Public Utilities Commission of Kansas establishing, as it claimed, an increase in rates, and *its petition was consented to by the Commission* without, however, an express finding by the Commission under Section 13 of the Public Utilities Law that the contract rates were unreasonable. Thereupon the Wichita Company brought suit in the United States District Court of Kansas to enjoin the Commission from putting the new rates in force. The District Court gave judgment for the Wichita Company, but this was reversed by the Circuit Court of Appeals.

It was contended that the Kansas Company could not, by filing amended schedules *under Section 20*, affect its *contract* obligations to the Wichita Company, but that nothing except proceedings under Section 13, including an express finding by the Commission that the contract

rates were unreasonable, would suffice. It was held that the Kansas Company could not thus affect its contract with the Wichita Company, but *that until the contract had been terminated by the Commission according to the requirements of the Statute it was binding on the parties.* The Court held *an Order based upon specific findings by the Commission under Section 13 was necessary to accomplish this.* The Court, speaking by the Chief Justice, said at pages 56-57:

> "It is said that the order in this case was authorized by §20 and therefore that all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required as in §13 and §16. This construction of §20 is doubtless correct, but *it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so any more than would the original filing of a schedule of rates under §11 requiring every public utility to publish and file with the Commission all schedules of rates do this.* The consent of the Commission in §20 is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. *The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and inter partes.*"

In conclusion, the Court said at pages 58-59:

> "The proceeding we are considering is governed by §13. *That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates.* The power is expressly made to depend on the condition that

after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. *We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.*

This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405."

It will be observed, therefore, that it was held that the Utility could not secure an increased rate under Section 20 of the Public Utilities Law of Kansas *because it was bound by a contract* the validity of which was recognized by this Court. If it were true, as it is now asserted by the Appellee, that the contract was terminated when the rate became unreasonable, the Utility, with the consent of the Commission, could have secured an increase *under Section 20.* It was because the Utility was under contract *binding the parties, although not binding the State,* that it was required to proceed under the general provisions of Section 13 of the Law.

The Legislature of New York Has Repeatedly Recognized in the Public Service Commission Law the Validity of Rate Contracts.

1.

We have shown in our earlier brief (pages 50-51) that in 1921, by Amendment, the Legislature provided that a rate prescribed by

> "contract, grant, franchise, condition, consent or other agreement"

should be subjected to the jurisdiction of the Commission under Section 49. If such *contractual* rates were void, as the Appellee now suggests, it was not necessary or appropriate to *subject them to revision* by the Commission. By subjecting contractual rates to *regulation* the Legislature clearly recognized their "effectiveness" as between the parties.

2.

At the same time (1921) the Legislature by Article VI (Section 108) made provision for a Plan of Readjustment which contemplated "the continued operation of the railroads at the present or lowest possible fares" and expressly authorized the Commission to "*agree with railroad companies upon changes in and modifications of the terms and conditions of any contract*" pursuant to which any railroad had been "equipped, maintained or operated." It is self-evident that if, as it is now asserted, such fare provisions were void, a "*modification*" of those provisions would not have been required. *Again*, therefore, the Legislature recognized the validity of these provisions and their binding effect on the parties even if we assume, as we are assuming now, that they were subject to the jurisdiction of the Commission.

3.

Most important of all, however, is the Amendment of 1922 (see our earlier brief, pages 51-53) by which the fare provisions in contracts *were expressly withdrawn* from the jurisdiction of the Commission. Manifestly, by doing this, the validity of such *contractual* rates, at least as between the parties, was not only assumed but *recognized* by the Legislature.

Recognition by the Interborough Company of the Validity of the Contracts.

On the question of the validity of the Contracts, the Interborough's Memorial of 1925 to the Legislature is highly significant. Quite aside from admissions which it contains that the Public Service Commission Law as it now stands does not vest jurisdiction in the Commission over the Contracts here, it contains unmistakable admissions that the Contracts are valid, binding and subsisting. A few extracts from the Memorial, which is fully considered at pages 55-58 of our earlier brief, will suffice.

After declaring that they (the Commission and the Board of Estimate) have both publicly declared their opposition *to any change* in the *contractual* rate, it proceeds:

> "In 1921 Statutes were enacted which *authorized the Transit Commission to increase* the rate of fare in a proper case,"

but that

> "In 1922 and 1923 the Transit Commission procured changes in the Statute of 1921 which were intended *to deprive the Commission of such authority.*"

It was further stated that following this

> "A public announcement was made that it was the purpose of the Company *to carry out the Contracts with the City without change and without further request for change.*"

What more conclusive evidence is possible to show that the Contracts, *binding the parties*, were in 1921 *subjected* to regulation and, in 1922 and 1923, *withdrawn* from regulation, so that at that time (1925), they were valid and subsisting obligations at least so far as the parties were concerned.

In fact, the Complaint in this action *alleges* (both as to the Certificate and Contract 3) the existence of the Contracts, but contends as to both that they are "*subject to regulatory authority*" (Record, pages 37, 51).

The Contracts Here Were, however, Expressly Authorized by Legislation Even if it be Assumed that they Were Subject to the Jurisdiction of the Commission.

It is difficult to understand how it can be suggested that the Contracts here, which were expressly authorized by Statute (see our earlier brief, pages 150-156), *are forbidden and illegal*. It would be anomalous enough to say that such Contracts are subject to revision by the Commission (see our earlier brief, pages 157-161), but it is unthinkable that they are void.

Even if we assume that the provisions of the Public Service Commission Law were "written into" these Contracts (*People ex rel. City of New York* v. *Nixon, supra*) it would only result in the conclusion that the Contracts are valid but *subject* to the jurisdiction of the Commission. If such a stipulation had been actually written into the Contracts by the parties here, *what would such a stipulation provide?* It would provide as follows:

> "The rate of fare agreed upon by the parties in this contract *shall be subject to change by the Transit Commission.*"

This is unconsciously conceded by the Appellee when it says (Interborough brief, page 40):

> "It does not detract from the usefulness of a contract as a method of *fixing an initial fare*, which may persist until through changing conditions it becomes either too low or too high, to deny to it an effect which would bar both the utility and the municipality *from then insisting* that it has ceased to be reasonable."

However illogical this argument may be, it involves the admission that the parties *were authorized to agree upon a rate of fare which would bind the parties at least until the Commission, in the exercise of its regulatory powers, should change the rate* if, on account of altered conditions, it had become unreasonable.

VIII.

There has been no attempt to enforce against the Plaintiff the provisions of Chapter 743 of the Laws of 1894, nor does the Complaint so allege.

We intend here merely to emphasize the fact that *no one has threatened or attempted to enforce this Statute* which, as to that part of the Elevated lines to which it applies, *was followed and superseded in 1913 by the Elevated Extension Certificate.* Although it is alleged in the First Cause of Action (which relates to this Statute) that the defendants are attempting to enforce *a* five-cent rate of fare, *it is not alleged*, nor could it be, that the defendants are attempting to enforce that rate of fare *under the provisions of that Statute.* The four succeeding Causes of Action *specifically allege that the defendants are attempting to enforce the five-cent rate under the Contracts* which render immaterial the rate limitation prescribed by Chapter 743 of the Laws of 1894, enacted almost twenty years before.

It is furthermore important to observe:

1. That the Decision and Order of the Commission (see our earlier brief, pages 68-70) *are based entirely on the Contracts* and do not even refer to the Statute of 1894.

2. That the suits instituted by the City and the Commission (see our earlier brief, pages 71-73) are not

brought nor do they refer to the Statute of 1894, *but are instituted only to enforce the Contracts.*

Aside, therefore, from all the other considerations to which we have previously referred, the plaintiff is not entitled to an injunction restraining the enforcement of a Statute which neither the Commission nor the City have attempted to enforce.

IX.

The Plaintiff's allegations of forcible interference with its property are without substance and, moreover, present no Federal question.

The Interborough's brief, at page 98, refers to an irresponsible newspaper story stating that the Mayor of New York City intended to seize the subways. This is the only evidence offered to support such an *intention* and it is denied by the Corporation Counsel and by Mr. Untermyer (Record, page 1117). Moreover, the Complaint asks, and the Order appealed from grants, no relief against such seizure. But were the contrary true, it would not afford a basis for the exercise of Federal jurisdiction, since such an act, not authorized by Statute, Ordinance or Order would constitute a mere private injury or trespass.

Virginia v. *Rives*, 100 U. S. 313.
Civil Rights Cases, 109 U. S. 3.
In re Rahrer, 140 U. S. 545.
Corrigan v. *Buckley*, 271 U. S. 323.
United Mine Workers v. *Chafin*, 286 Fed. 959.

The only other "threat" referred to in the Complaint is the statement of the Mayor that the City would fight the increased fares "to the last ditch" (Record, page 87). This, of course, is perfectly consistent with orderly court proceedings and, *as the sequel shows*, this was exactly what was intended.

PART II.

JURISDICTION OF THE COMMISSION.

Preliminary to consideration of the Appellee's contentions, we direct attention to the fact that many, if not most, of the contentions of our earlier brief remain altogether unanswered.

Thus, the distinction which has been applied by this Court and by the Courts of New York State (our earlier brief, pages 142-145) between the rule of construction applicable, in cases where the question concerns the *suspension* of the police power of the State, and cases where it concerns a *delegation* of that power to a Commission, stands unanswered and unrefuted by the Appellee. As to this the Appellee contents itself with a repetition of the statement, thus shown to be inapplicable, that the authority must "clearly and unmistakeably" (Interborough brief, page 42) appear to sustain the *alienation by the State* of its regulatory power.

The fundamental consideration that the Rapid Transit Act is, in its nature, a *special* Statute, applicable to a particular and limited class of cases and, for that reason, paramount over the *general* provisions of the Public Service Commission Law, including the leading case of *Parker* v. *Elmira C. & N. R. R. Co.*, 165 N. Y. 274 (page 165 of our earlier brief), is ignored.

For similar reasons the Appellee also ignores the vital provisions of the Rapid Transit Act, *enacted in 1912* (considered at pages 29 and 168 of our earlier brief), which authorized the preferentials to the City *only in the event* that the new lines were operated for *"a single fare"* in connection with the earlier lines then in operation under Contracts 1 and 2, stipulating for a five-cent fare, and *which are expressly referred to by the Legislature*.

The Amendments of 1921, 1922 and 1923 together with the Interborough's proceedings for an increased fare to which they are related (our earlier brief, pages 50-55; 172-173) are dismissed with the casual statement (Interborough brief, page 52) that the Amendments left the Statute in 1923 as it had existed previous to 1921, as if that were an explanation of the legislative purpose which the Legislature, by these consecutive Amendments, had revealed.

The Interborough Company's Memorial of 1925 to the Legislature (our earlier brief, pages 55-58) in which the plaintiff itself interpreted the Amendments of 1921, 1922 and 1923 and in which it interpreted also *its present position* under the Rapid Transit Act and the Public Service Commission Law, are very wisely not referred to by the Appellee.

The consideration that, by express legislative enactment, the Contracts could not be made without the *approval* of the City (our earlier brief, pages 11, 46, 173-174) nor modified by the Commission without similar *approval* (our earlier brief, pages 59, 174), is not referred to by the Appellee. The *mandatory provisions for an inflexible five-cent fare* on privately constructed Rapid Transit lines (our earlier brief, pages 8-9, 20-21, 174-175) which was continued in the Rapid Transit Act after the enactment of the Public Service Commission Law; the significant provisions of Section 38 of the Rapid Transit Act (our earlier brief, pages 177-178) and the equally significant contrast between Sections 24 and 27 with Section 30 of the Rapid Transit Act are quietly ignored.

The Appellee does not refer to nor does it attempt to reconcile the inconsistency of the Commission's position (our earlier brief, page 175) if it were held to be a *contractual* party and a *regulatory* body with respect to the *same* Contracts, or the repugnancy between its duty to enforce and its duty to modify the contractual terms.

I.

The public policy of New York State is expressed at least as effectively in the Rapid Transit Act as in the Public Service Commission Law.

The Appellee's entire argument rests upon the assumption that the Public Service Commission Law expresses a rule of public policy as exalted as a Constitutional provision and that the Rapid Transit Act (amended over forty times) is less important than a village ordinance. Surprise is even expressed (Interborough brief, page 48) that the Constitution of New York State (Section 18 of Article III) after the enactment of the Public Service Commission Law "was in no way changed," as though the State *Constitution* should have been amended to conform to the Statute.

Needless to say, the two Statutes—the Rapid Transit Act and the Public Service Commission Law—are, as Statutes, of equal dignity and the only possible distinction between them is (1) that the Rapid Transit Act is a Statute *special* in its nature and applicable to the local conditions with respect to which it was enacted and (2) that it is *later* in point of time than the Public Service Commission Law. The Rapid Transit Act quite as effectively, and more effectively as we believe, declares the public policy of New York State which is, that the Commission and the Utility should *agree* upon the rate of fare in the Contracts which it authorized.

Three times at least the Court of Appeals has considered cases where the provisions of the Public Service Commission Law conflicted with the provisions of other Statutes and *on each occasion the inconsistent provisions of the Public Service Commission Law have been required to give way.*

In one of these—*People ex rel. New York, New Haven & Hartford Railroad Co. v. Wilcox*—referred to at page 162 of our earlier brief, to which we most earnestly refer the Court—the jurisdiction of the Commission was in direct opposition to "conflicting provisions of the Greater New York Charter" conferring similar jurisdiction on the Board of Health. Admonishing the Commission that its powers "should not be extended by implication" the Court subordinated the provisions of the Public Service Commission Law to the provisions of the Charter saying (pages 429-430):

> "Judicial construction of a *general* statute should guard against interpreting its language so as to create conflict or contradiction with the provisions of an *earlier* and *special* statute."

Again, in the *Brooklyn City Railroad case* (our earlier brief, page 163) the jurisdiction of the Public Service Commission was denied where the Legislature itself, although by an earlier Statute, had created a conflicting right.

> "The Public Service Commission *may not veto a statute*. It is only *a legislature creature*,"

said the Court.

Again in the *Village of Port Edward case* (our earlier brief, pages 163-164) conflict occurred between the jurisdiction of the Public Service Commission and the Railroad Law concerning the requirement for a certificate of "convenience and necessity" and again the jurisdiction of the Commission was held to be limited as against the inconsistent Statute, the Court saying:

> "The Legislature by Section 12 of the Railroad Law had *itself determined the question of convenience and necessity in such cases*."

That is precisely what the Legislature undertook to do by the Rapid Transit Act and there is no justification for the contention that the Public Service Commission Law establishes a rule of public policy that other Statutes may not abrogate, or that, for some reason not explained, is superior to the provisions of the Rapid Transit Act.

It is said that the circumstance that in 1909 and 1912 the Legislature *re-enacted* the fare provisions of Sections 24 and 27 of the Rapid Transit Act, is not of paramount importance and that we "attach altogether disproportionate significance to the term 're-enactment' " because in New York the Legislature re-enacts the entire Section in its amended form (Interborough brief, pages 144-145). But is it contended that when the Legislature amended Sections 24 and 27 in vital respects, both in 1909 and 1912, it was not conscious of the provisions which it re-enacted? This could not be assumed in any case and it certainly cannot be assumed here, where, as we have shown (pages 167-168 of our earlier brief) *the rate of fare had direct relation to the new Amendments introduced into Sections 24 and 27 both in 1909 and in 1912.*

Section 95 of the General Construction Law, referred to at page 45 of the Interborough's brief, relates only to the *repealing* provisions of a Statute. That Section was enacted in order that a Statute, re-enacting with Amendments and simultaneously *repealing* an earlier Statute, would not be held to abrogate rights or liabilities created by or incurred under the earlier Law.

At pages 25-31 of our earlier brief we showed fully the conditions under which the Amendments of 1912 were enacted and that they were intended to authorize Contracts containing provisions for *a permanent five-cent fare.* It is altogether inaccurate to say that the Amendments of 1912 to the Rapid Transit Act authorized a contract "of

the general nature of Contract No. 3" (Interborough brief, page 52). These Amendments authorized *these particular contracts*, containing provisions for *a single five-cent fare*, the execution of which had been postponed until full authority could be secured from the Legislature and until the Contracts had been sustained by the Courts (see our earlier brief, pages 25-29). The Legislature *expressly* granted that authority by Statute (Chapter 226 of the Laws of 1912). The Court of Appeals *expressly* sustained the Contracts (*Admiral Realty Co. v. City of New York*, 206 N. Y. 110). It is difficult to understand, therefore, *in the light of the conditions under which the Contracts were made*, what more the Commission, the City, the Interborough, the Legislature or the Courts of New York State could have done to insure the validity and binding character of the contractual rate.

II.

The decisions of this Court establish that contracts for a permanent rate of fare were authorized by the provisions of the Rapid Transit Act.

The Interborough in its brief does not distinguish the following cases:

> *Cleveland v. Cleveland City Railway Co.*,
> *Columbus Railway & Power Co. v. Columbus*,
> *Omaha Water Co. v. City of Omaha*,

considered at pages 153-155 of our earlier brief, in each of which it was held that language identical with the language of Section 24 *authorized the execution of a contract for a permanent fare*.

To the same effect as the cases above cited is *Detroit United Railway v. Michigan*, 242 U. S. 238. The statute there described in the opinion of this Court (pp. 248-

249)—was almost identical with the provisions of the Rapid Transit Act authorizing the Elevated Certificate:

> "*It is not open to serious dispute, that the original village and township grants were contractual in their nature.* It appears that the recipients of those grants, like their successor, the plaintiff in error, became incorporated under the Street Railway Act of 1867, *of which Sec. 13 provides that consent for the construction and maintenance of a street railway is to be given by the corporate authorities in an ordinance to be enacted for the purpose, and under such rules, regulations, and conditions as may be prescribed by such ordinance, but that no such railway shall be constructed until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets.* • • • It is plain, as was pointed out by this court in *Detroit* v. *Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 385, that *the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company.* And in these cases, as in that, the terms of the several ordinances *are such as clearly to import a purpose to contract under the legislative authority thus conferred.*"

Reversing the judgment of the Court of last resort of Michigan this Court held the authority thus conferred upon the City to authorize *a contract for a permanent fare* even sufficient to suspend *the power of the State* over the rate. It said (pp. 251-252):

> "Defendants in error invoke the established rule that the terms of a municipal grant or franchise should be construed strictly as against the grantee, and as favorably to the grantor as its terms permit. The state court deemed the rule to be applicable."

The Court added:

> "The ordinances, just because they were intended *to be contracts*, and not merely *legislative enactments*, ought to be regarded as having reference to a specific subject-matter."

If it be true then, as the Appellee contends (Interborough brief, page 76), that "as to the elevated lines there is even less basis for argument of legislative authority for a contract as to fares" than as to the Subways, it is difficult to understand, under controlling decisions of this Court, how the authority can be denied in either case.

III.

The Appellee's interpretation of the *Admiral Realty Co.* case shows that the question presented here was decided there.

The Interborough in its brief (page 56) contends that the *Admiral Realty Co. case* does not apply because:

> "The size of the fare *affected only the probable amount of the operating earnings of the Company out of which alone reimbursement to the City was to come.* It, therefore, related only to the wisdom of the contract from the City's point of view which was in no way before the Court."

It is, therefore, contended that the question of the *adequacy* of the return to the City on its investment in the lines was a question which related to the wisdom of the Contracts, which the Court declined to review. In this we fully concur—in fact, *this is precisely our contention here* and it is particularly for that reason that the *Admiral Realty Co. case* applies.

In the *Admiral Realty Co. case* the plaintiff, a taxpayer of New York, contended that the *permanent fare limitation of five cents*, coupled with the preferential payments

to the Interborough, rendered so highly improbable an adequate return to the City on its investment in the lines that the Contracts constituted, in effect, a "gift" of the City's property in violation of the State Constitution. If, as it is now contended, the rate of fare was required to be increased, *by operation of law*, should it fail to produce a return to the Interborough and to the City on the combined investment of both, *the question of whether the City was making a "gift" of its property would not have been presented in the Admiral Realty Co. case.* It was precisely because the Court of Appeals recognized that the rate limitation *was binding during the term of the lease* that it became necessary to consider whether the lease, at a permanent five-cent fare, constituted a "gift" of the City's property.

The Court held, as the Appellee *correctly* contends, that the inadequacy of the return to the City at a permanent five-cent rate was a question for the determination of the City not judicially reviewable. If the return, as it is now contended, was required by Commission regulation to be reasonable at all times, the decision of the Court that the adequacy of the return at a permanent five-cent fare was a question committed to the determination of the City, *was altogether superfluous.* In holding that the City and not the Court was the final judge of whether the return on its investment at an inflexible five-cent fare was adequate, *the Court held that the fare of five cents was inflexible and would not or might not be adequate.* If, as the District Court has held, the rate was required *to be adequate at all times* to yield a fair return on the investment, then how, we inquire, was the question of the adequacy of the return involved. But the Court of Appeals conceded that the return would, or at least might, be inadequate and, in conceding that the return would be inadequate, the Court recognized that the five-cent fare was not subject to increase by the Commission.

Upon the *Interborough's* contention, therefore, with respect to the *Admiral Realty Co. case* in which these particular Contracts were sustained, we insist that the question presented *here* was directly involved, considered and *decided there*. For a full statement of the conditions surrounding this important litigation, to which the Appellee does *not* refer, we respectfully refer to pages 22-26 and 168-171 of our earlier brief.

IV.

Even if Rapid Transit Railroads are included in the definitions of the classes of carriers subject to the jurisdiction of the Commission, it does not follow that rate contracts made with legislative authority are subject to its regulatory jurisdiction.

It is suggested by the Appellee (Interborough brief, pages 28-30) that Rapid Transit Railroads are within the definition of Section 2 of the Public Service Commission Law with respect to "street railroads" and it is suggested that, therefore, even rate contracts made under express legislative authority must also be subject to the regulatory powers of the Commission.

Although the broad language of these definitions might be sufficient, in the absence of other considerations, to include Rapid Transit lines, this conclusion is made more than doubtful by the "definitions" of Section 105 of *Article VI* of the Law, which provides:

> "DEFINITIONS. *When used in this article*, unless the text clearly indicates that another meaning is intended * * *
>
> "7. The words 'railroad' and 'railroads' *shall include rapid transit railroads*, street surface railroads and stage and omnibus lines, etc."

Article VI, which deals with the preparation of a Plan of Readjustment, is concerned with Rapid Transit railroads. If it was intended to include Rapid Transit railroads in the definitions of Section 2 of the Law (subdivisions 5 and 6 relating to Street Railroads and Railroads) it is inexplicable why, by Article VI, Rapid Transit railroads should have been *specifically* included *but only "when used in this Article."* The intention seems, therefore, to have been to include Rapid Transit railroads *only* in Article VI of the Public Service Commission Law, thereby not subjecting them to the other provisions of the Law.

But it is not necessary to decide this question, because, even if Rapid Transit railroads are thus included, it does not follow that the Commission has power of revision over rates expressly authorized by the Rapid Transit Act. *The fact that the contractual rate of fare is not subject to the Commission's jurisdiction does not justify the conclusion that the Utility is thereby exempted from all its other regulatory powers.* Only to the extent that the parties *have contracted*, are the matters so contracted for, withdrawn from regulation by the Commission.

To illustrate our meaning, let it be supposed that the Legislature had provided in the Rapid Transit Act that the *rate of fare* (although *not* contractual) on Rapid Transit lines should *not* be subject to the jurisdiction of the Commission. Obviously this would have exempted such rates from regulation, but it would not have exempted Rapid Transit lines from all the other regulatory provisions of the Law. Yet, this is precisely what the Legislature undertook to do in the Rapid Transit Act when it authorized a *contractual* rate of fare. It did not thereby suspend all the *other* regulatory powers of the Commission over Rapid Transit lines.

This question was decided in the *Quinby case*. The Utility there was a *Street Surface Railroad* and, beyond dispute, was subject to the jurisdiction of the Public Service Commission. Nevertheless it was held that *the rate of fare*, under the contracts there, was not subject to the jurisdiction of the Commission *over rates*. That did not mean, nor was it suggested, that the Street Surface Railroad there was thereby exempted from all *other* regulation. It meant only that the *contractual fare* was not subject to revision by the Commission.

V.

The fact that the Commission under the express provisions of Contract 3 has exercised jurisdiction over service on the Subway lines is not inconsistent but consistent with our contention.

It is important in discussing this subject to remember that the Elevated Extension Certificate *contains no contractual provisions* with respect to "the character of service to be furnished" as does Contract 3 relating to the Subways. Accordingly the Commission's authority over service on the Elevated lines is *statutory* under the Public Service Commission Law and *contractual* with respect to the Subways under Contract 3.

It is contended (Interborough brief, pages 70-73) and is not disputed that the Commission, under Contract 3, has frequently exercised supervision over the character of service on the Subway lines and it is, therefore, suggested that this furnishes some indication that it has the same power over the rate of fare. This, however, does not follow, as we will proceed to show.

The Legislature was under no duty to regulate the service on the Subway lines. It might refrain from regulation altogether or it might delegate to the parties the

power to contract concerning "the character of services to be furnished and otherwise" (our earlier brief, pages 175-177), and this it did, as to the Subways, in Section 27 of the Rapid Transit Act. The parties here—the Commission, the City and *the Interborough—so construed this provision* and by Contract 3, the agreement of the parties concerning "the character of services," was incorporated in elaborate provisions on that subject (see our earlier brief, pages 175-177).

The Commission has, of course, exercised the contractual powers thus received. *Except in a single case* soon to be considered, it is not denied that its powers over services *have been exercised under Contract 3 and not under the Public Service Commission Law* (Interborough brief, pages 70-72).

It is said, however (Interborough brief, page 72), that the contractual power over services which are there quoted are not broad enough to require "additional service involving large capital outlays." But that provision is not limited as the Appellee suggests, and if it is, then the Public Service Commission Law is similarly limited for the provisions of Contract 3 and those of the Public Service Commission Law (Section 26) with respect to "service and facilities" *are identical.*

There is no justification in the record for the statement at pages 70-72 of the Interborough brief that the Commission exercised its powers with respect to the service on the Subway lines *under the Public Service Commission Law except in Case No. 2081,* referred to at page 71. This exception gives particular force to our contention because *Case No. 2081 involved an Order relating to the Elevated lines at 149th Street and Third Avenue* (Interborough brief, page 71; also Interborough Appendix, page 249). This exception establishes our contention because the contractual power over service *on the Subways* under

Contract 3 *is not applicable to the Elevated lines* under the Certificate which contains no contractual provisions with respect to service. The Commission's jurisdiction over service on the Elevated lines could, therefore, be exercised *only* under the Public Service Commission Law and the single exception referred to, therefore, *which involved the Elevated lines* furnishes the strong corroboration of our argument.

VI.

The Appellee's contention that the power of the parties to agree upon the rate of fare under the authority of the Rapid Transit Act is limited to "fixing an initial fare" would, if sustained, render the provisions of the Rapid Transit Act meaningless and nugatory.

At page 40 of the Interborough's brief, apparently in answer to our argument (pages 157-161 of our earlier brief), it is said:

> "*It does not detract from the usefulness of a contract as a method of fixing an initial fare*, which may persist until through changing conditions it becomes either too low or too high, to deny to it an effect which would bar both the utility and the municipality from then insisting that it has ceased to be reasonable."

Before we consider to what extent such an interpretation would "detract from the usefulness of a contract" with respect to the rate of fare it should be observed that *the Rapid Transit Act contains nothing to suggest such a limitation*. If the Legislature had intended to limit the contractual power of the parties to "fixing of an *initial* fare" it would have said so in a few simple words. Instead of thus limiting that power, it committed the entire subject

to the judgment of the Commission by providing, as to the Subways, that the rate of fare should be such

> *"as said Commission shall deem* to be best suited to the public interests"

and by authorizing an Extension Certificate to be conditioned upon

> "such other terms, conditions and requirements *as to the said Boards* [*Commission*] may appear just and proper."

But upon what theory can it be contended that a limitation authorizing only the "fixing of an *initial* fare" "does not detract from the usefulness of a contract"? If the "initial fare" thus agreed upon is reasonable, *then a contract is superfluous* for that rate of fare would be imposed in any event under the Public Service Commission Law. If the "initial fare" is unreasonably high or unreasonably low, then (if the Appellee's contention is correct) the fare is not only subject to immediate alteration by the Commission *but may immediately be ignored by the parties and its operation enjoined, as has been done here.** The result would be that if the parties should agree upon an "initial fare" either unreasonably high or unreasonably low, either party could, *the very moment the contract came into existence,* institute suit to enjoin its operation. It is grotesque, therefore, to suggest that such a limitation on the broad contractual powers delegated by the Rapid Transit Act "does not detract from the usefulness of a contract" if it only permits a contractual rate, which would be established *without contract* by the Public Service Commission Law, and which, if it is in derogation of the provisions of that Law, *is ineffective for every purpose.*

---

* Note—Here *both* parties recognized that the five-cent fare would be non-compensatory during the first years of operation due principally to the fact that the new lines would serve undeveloped territory (Record, pages 457, 579).

Nor can it be contended that, construed as the Appellee and the District Court have construed the Contracts,

> "there is no inconsistency between the Rapid Transit Act and the Public Service Commission Law" (Interborough brief, page 31).

A contract which, as the plaintiff contends, *does not even bind the parties to the contract* and may be disregarded by either party at any time, is equivalent to no contract at all.

Under these circumstances the Statute which is *special* in its nature is to be regarded as an exception to a *general* Law (*Parker* v. *Elmira C. & N. R. R. Co.*, 165 N. Y. 274, and authorities cited at page 166 of our earlier brief). Here it is actually argued, and the District Court has held (Record, pages 1979-1980) for the first time in the history of the law, that because the Public Service Commissions Law is a *general Statute of statewide operation* applicable to all classes of utilities, it is, **as a general Statute,** paramount over a Statute of a *special* nature which is applicable *only* to Rapid Transit Railroads in the City of New York. And yet that is the Interborough's fundamental contention here.

The Nixon Case.

The Court of Appeals in the *Nixon case* does not suggest that the fare stipulation there had been authorized by the provisions of the New York Charter, to which the Interborough refers at pages 49-50 of its brief. *Neither the Greater New York Charter nor any of its provisions are referred to in the opinion of the Court.* On the contrary, it is expressly stated throughout the opinion that the fare stipulation there was imposed under those provisions of *the State Constitution requiring the consent of the local authorities* to the construction and operation of a street railway and which concededly *contained no authorization*

for a stipulation as to fare. The Court said (pages 357-358):

> "On October 29, 1912, the South Shore Traction Company *obtained the consent of the City of New York to the construction and operation of a street railway* along stated streets and avenues, chiefly in the Borough of Queens. *The consent was given on the condition that five cents would be the maximum fare.*"

Further examination of the opinion in the *Nixon case* makes this conclusion irresistible. Expressly referring to the "*consent*" provision of the State Constitution, the Court said (page 360):

> "We left open the question whether there was any [restraint] *under the Constitution of the State (Constitution, Article III, Section 18; Matter of Quinby, supra,* page 363; *Matter of Int. Ry. Co., supra,* page 482) • • • On the other hand we expressly conceded, as we had often before held, that there was plenary power in the Legislature *to determine the conditions that might be attached by municipalities to consents to be given in the future.*"

Referring to the same question, the Court said (page 362):

> "We have held *in view of the constitutional provisions requiring the consent of municipalities to the construction and operation of railroads in their streets* that the statutes ought not to be interpreted as permitting the Public Service Commission in such circumstances as to nullify existing contracts. We are now asked to hold that the municipalities by their contracts may nullify existing statutes. We will not go so far."

The Federal authorities cited by the Court of Appeals in its opinion to sustain the conclusion that the Con-

stitution of the United States did not prohibit interference by the Legislature even with rate contracts *previously* made, show that the Court was dealing with a contract made *without* legislative authority, for *the cases cited are all of that class.* Referring to its previous decision in the *Quinby case*, the Court said (pages 359, 360).

> "We did not hold that there was any constitutional restraint upon the grant of such a power. Restraint *under the Federal Constitution*, there certainly was none (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U. S. 539, 548; *Hunter* v. *City of Pittsburgh*, 207 U. S. 161; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*, 248 U. S. 372; *Postal-Tel. Cable Co.* v. *Associated Press*, 228 N. Y. 370; *City of Englewood* v. *Denver & So. P. Ry. Co.*, 248 U. S. 294; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79; *People ex rel. Vil. of South Glens Falls* v. *P. S. Comm.*, 225 N. Y. 216)."

If the contract in the *Quinby case* had been *authorized by statute, there would, of course, have existed* "restraint under the Federal Constitution" against any impairment of its obligations (see cases cited at pages 148-149 of our earlier brief) by subsequent statute.

These considerations, taken in connection with the fact that nowhere in the *Vizon case* will be found direct or indirect reference to any legislative authorization for that contract, show that the Court was only dealing, *and intended only to deal*, with a fare stipulation executed under the *"consent"* provisions of the State Constitution, and imposed after the enactment of the Public Service Commission Law.

The Nixon Case, Considered in Connection with the Charter Powers of the City, Is the Strongest Possible Authority for Sustaining the Contracts Here.

It is very important that, in the briefs in the Court of Appeals in the *Nixon case* submitted *by the Street Railroad Company*, it was contended that these Charter "powers" *constituted limitations imposed by the Legislature* on the contractual powers of the City and that, therefore, the rule previously established in the *Quinby case* did not apply. In other words, that these Charter provisions *did not extend but limited*, as we believe they did, the contractual powers of the City. In fact, previous to the *Nixon case* it had been so held (*People ex rel. N. Y. W. & B. Railway Co.* v. *Public Service Commission*, 193 App. Div. 445; aff'd 230 N. Y. 604).

At page 50 of its brief the Interborough sets out in parallel columns the provisions of the Rapid Transit Act and *certain, but not all*, of the applicable provisions of the Charter. These provisions (Section 73) are described in the Charter as "*Limitations and Conditions* to the grants of franchises" and those "*Limitations and Conditions*" which are now sought to be expanded into *powers* are said to have authorized the fare stipulation in the *Nixon case*.

These provisions do not permit the execution of whatever contract concerning fares the City "*shall deem to be best suited to the public interests*" as does Section 27 of the Rapid Transit Act, or authorize the imposition of "such other terms, conditions and requirements *as to the said Boards* [*Commission*] *may appear just and proper.*" They *require* that "a **form** of contract" (Section 74) be prepared which shall make "*adequate provision to secure efficiency of service*" by the Utility "at **reasonable** rates," thus importing into the Charter almost *the exact language and limitations of the Public Service Commis-*

sion Law (*People ex rel. N. Y. W. & B. Railway Co.* v. *Public Service Commission*, supra).

But this distinction between the *limitations* on the City under the New York Charter and the *unlimited power* of the Commission under the Rapid Transit Act is not nearly so significant as what remains and which involves consideration of a provision of the Charter *to which the Appellee has not referred.*

The Public Service Commission Law was enacted on June 6, 1907, as Chapter 429 of the Laws of 1907. On the same day (June 6, 1907) the Legislature enacted Chapter 439 of the Laws of 1907, which revised and re-enacted Section 45 of the Greater New York Charter, so that, as amended, it read as follows:*

> "**Nothing in this Act contained shall repeal or affect in any manner the provisions of the Rapid Transit Acts** applicable to the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or any municipality united therewith or territory embraced therein **or repeal or affect the existing general laws of the State in respect to street surface railroads,** except that the rate of interest on all bonds issued for the construction and equipment of the rapid transit railway authorized pursuant to the provisions of chapter four of the laws of eighteen hundred and ninety-one as amended shall be fixed by the board of commissioners of the sinking fund. * * *"

The briefs of counsel for the Street Railroad Company in the *Nixon case* pressed these provisions of the Charter on the attention of the Court to show, as they unmistakably did show, the intention of the Legislature that franchises granted pursuant to Sections 73 and 74 of the Charter *should be subordinate to the Public Service*

* Note—It is not intended to suggest that the matter in black type was inserted by the Amendment of 1907.

Commission Law, which was enacted *on the same day* that this provision was amended. It was inevitable, therefore, that the Court, in the *Nixon case,* should hold that whatever Charter powers the City of New York might have did not "*affect the existing general laws of the State in respect to street surface railroads,*" which by the terms of the Public Service Commission Law previously enacted *on the same day,* subjected fares on street surface railroads to regulation.

What the Legislature *did* even with respect to the *limited* powers of the City under the Charter to make contracts at "*reasonable* rates," emphasizes and gives force to what the Legislature did *not* do with respect to the *unlimited* grant of power *to the Commission,* acting with the approval of the City, under the Rapid Transit Act. This could not have been the result of oversight because, as we have shown, Section 45 of the Charter was amended and reenacted on the *same* day that the Public Service Commission Law was enacted and on *that day* the Rapid Transit Act also was amended (see our earlier brief, pages 18-19).

By these various enactments of the same day with respect to

(1) The Public Service Commission Law,

(2) The New York City Charter,

(3) The Rapid Transit Act,

the attention of the Legislature was concentrated on this issue and, that being so, how can any doubt exist that it was the intention of the Legislature that the Commission, under the contractual authority delegated by the Rapid Transit Act, acting in co-operation with the City, should exercise powers with respect to *municipally* constructed Rapid Transit lines that were withheld from the City under its Charter, with respect to *franchises* granted to *privately* owned and operated Street *Surface* lines.

The Provisions of Section 45 of the Greater New York Charter, Expressly Applicable to the Rapid Transit Act, Prove That the Limited Powers of the City to Contract Under the Charter Should Not Apply to the Unlimited Contractual Power of the Commission and the City Under the Rapid Transit Act.

The very Charter *limitations* now under consideration directly refer to "the Rapid Transit Acts" and it was expressly provided thereby that nothing in the Charter should "*repeal or affect in any manner the provisions of the Rapid Transit Acts.*" There can be no reasonable doubt concerning what was thus intended. The provision was inserted to remove any possible doubt concerning the power of the City *to contract concerning fares and in order to express the purpose of the Legislature that the limitations of Sections 73 and 74 of the Charter concerning the grant of franchises "at* **reasonable** *rates" should not be applicable to Contracts made under the Rapid Transit Act.*

By that significant clause, and *by failing to insert* in the Rapid Transit Act provisions similar to those of Section 45 of the Charter which *subordinated* franchises granted to street *surface* lines to "the existing general laws of the State in respect to street *surface* railroads," the Legislature unmistakably declared that it intended to subject contracts made under the Charter powers of the City to the Public Service Commission Law, but that *contracts made under the Rapid Transit Act were not to be subjected to the jurisdiction of the Commission.*

VII.

In *People ex rel. Village of South Glens Falls* v. *Public Service Commission*, 225 N. Y. 216, and *People ex rel. Bridge Operating Co.* v. *Public Service Commission*, 153 App. Div. 129, the power conferred by Statutes which allowed "reasonable regulations" in the first case and authorized the Trustees of the Bridge "to fix the rates of toll" in the second case, were held not to authorize Contracts with third persons for a specified term concerning the rate of fare.

We have shown at pages 157-164 of our earlier brief that where the Legislature has authorized a *contract* concerning the rate of fare, it cannot be presumed to have intended that contract to be subject to immediate revision under the general provisions of the Public Service Commission Law. Where, however, the Legislature has allowed the municipality to *"regulate"* or where it has authorized the municipality to *"fix"* the rate of fare to be charged, it has excluded the conception that instead of *"regulating"* or *"fixing"* the rate, the municipality may enter into a *contract* with the Utility for a stipulated rate of fare for a term of years, not alterable by the Agency established for that purpose.

This distinction was considered by this Court in *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265, in a case, however, which involved the suspension of the power of the Legislature during the term of the contract. Distinguishing between the power to "regulate" or "fix" rates—a power frequently vested in municipalities—and the power of a municipality to *contract* with respect to rates, this Court said:

> "The charter gave to the council the power 'by ordinance * * * *to regulate* telephone service and the use of telephones within the City * * * and

> *to fix and determine* the charges for telephones and telephone service and connections.'"

Here there was plainly no contractual authority, the power being of exactly the same nature as was vested in the Village of South Glens Falls to prescribe "reasonable *regulations*" and in the Trustee of the Bridge "*to fix* the rates of toll." It was therefore held that the City of Los Angeles had no power under such *regulatory* authority *to contract* concerning rates for a definite term. Referring to this, the Court said:

> "The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' *This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself.* It speaks in words appropriate to describe the authority to exercise the governmental power, but *entirely unfitted to describe the authority to contract.* It authorizes *command*, but not *agreement*. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described *was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.'* It authorizes the exercise of the governmental power and nothing else."

Then recapitulating the earlier decisions of this Court in which the question of the power of a municipality to make such contracts was considered, the Court said:

> "In *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, the contract was in specific terms

ratified and confirmed by the legislature. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, the contract was made in obedience to an act of the legislature that the rates should be *'established by agreement* between said company and the corporate authorities.' The opinion of the court, after saying (p. 382) 'It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare,' pointed out (p. 386) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as 'comprehensive power *to contract* with street railway companies *in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated.*' In *Cleveland* v. *Cleveland Electric Ry.*, 201 U. S. 529, precisely the same authority appeared. In *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, the court said (p. 508): 'The grant of legislative power upon its face is unrestricted, and authorizes the "city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end *to contract* with a party or parties who shall build and operate waterworks."'"

Bearing in mind the distinction between the power to *regulate* and the power to *contract*, as formulated by this Court in the *Home Telephone and Telegraph case*, the decisions in the *Village of South Glens Falls case* and in the *Bridge Operating Co. case* are found to be not only consistent with our contention but to plainly sustain the right of the City to contract for an unalterable fare in the case at bar. This is so because it appears to have been clearly recognized in those decisions that if the authority to con-

tract had been conferred, the contracts thus made would not have been subject to the jurisdiction of the Commission, for, if that was not recognized, why should the Court so closely have examined the nature of the statutory authority under which the authority had been exercised?

In *Village of South Glens Falls case*, referred to at pages 21-24 of the Interborough's brief, the franchise limitation had sought to be imposed under the Transportation Corporation Law, which authorized the grant of franchises upon "reasonable *regulations*." The Court said:

> "The right which the village had to annex terms to its license given in 1900 to the gas company is to be found in article VII, section 61, subdivision 1, of the Transportation Corporations Law (Cons. Laws, ch. 63). This gives to gas companies the power 'to lay conductors for conducting gas through the streets * * * in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable *regulations* as they may prescribe. * * *'
>
> "But the *regulations* regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations *cannot be said to form contracts* beyond the inherent police power of the legislature to modify for the public welfare."

In a concurring opinion, McLaughlin, J., expressed the same view. He said (p. 226):

> "*Our attention has been called to no provision in the charter of the village of South Glens Falls by which it is claimed the power was given to such village to fix the maximum rate at which gas should be sold to consumers.* It may be assumed that the charter gave to the village the right to make certain contracts necessary for its corporate existence, but this power *did not include the right to make a contract* fixing the rate at which gas should be sold to the public."

Continuing, he said (p. 227):

> "It is true that in article 7, section 61, subdivision 2, of the Transportation Corporations Law (L. 1909, ch. 219) the right of a public service corporation to lay conductors for conducting gas through the streets of a city or village is given, but this right cannot be exercised without the consent of the municipal authorities 'under such reasonable *regulations*, as they may prescribe.' 'Reasonable *regulations' does not include the right to fix a rate so that the state cannot interfere and fix a different one.* (*Wyandotte County Gas Co.* v. *Kansas, supra; Portland R. L. & P. Co.* v. *City of Portland*, 201 Fed. Rep. 119; *City of Benwood* v. *Public Service Commission*, 75 W. Va. 127; *Milwaukee Electric R. & Lt. Co.* v. *Railroad Commission*, 153 Wis. 592. See also, *People ex rel. N. Y. & N. S. T. Co.* v. *Public Service Commission*, 175 App. Div. 869; *People ex rel. Bridge Operating Co.* v. *Public Service Commission*, 153 App. Div. 129.)"

In the *Bridge Operating Co. case*, referred to at pages 57-58 of the Interborough's brief, the authority was similarly limited, and the Court expressly distinguished between the City's authority "to *fix*" the fares and authority to *contract*. At pages 137-138 the Court said:

> "Referring back to the statutory authority under which the agreement of May 21, 1904, was entered into by the bridge commissioner in behalf of the City of New York it will be seen *that no authority is given to him to fix any specific time during which the fares authorized by him shall prevail.* His authority, like that conferred upon the officers of the town of Middletown, *was merely to fix the fares to be charged* upon a railroad operating over the bridge (Laws of 1882, Chap. 410, Sec. 1980), *but he was not given power to make a permanent rate or one which should obtain for any definite period. In so far as he undertook to do this he acted with-*

out legislative authority, and his act cannot bind or control the power of the Legislature. The Bridge Operating Company and those interested with it were bound to take notice of *the limitations imposed by statute* upon the commissioner with whom they contracted."

VIII.

Town of North Hempstead v. _Public Service Corporation_, 231 N. Y. 447, and _Public Service Commission_ v. _Pavilion Natural Gas Co._, 232 N. Y. 146, cited by the Appellee, both involved proceedings under sections of the Public Service Commission Law relating to Gas corporations which differed entirely from the provisions with respect to Railroads.

Three questions were presented in those cases.

First, whether the contracts there, *not authorized by any legislation*, and made after the enactment of the Public Service Commission Law, were subject to the jurisdiction of the Commission?

Second, whether a *Gas* corporation, bound by private contract, could initiate proceedings to secure an increased rate under Section 66 of the Public Service Commission Law by filing amendatory schedules, instead of under the general provisions of Section 72 which corresponds with Section 49?

Third, whether a *Gas* corporation, as Section 66 *then* stood, could file amendatory schedules effective after thirty days and *whether the Commission was powerless to take action against the increased rate until after the rate had become effective?*

(1)

We need not consider this question in detail because it is identical with the question that was presented in the

Nixon case, which was followed by the Court in the *North Hempstead* and *Pavilion Gas Co. cases*. It was held upon the authority of the *Nixon case* that such contracts (*not authorized by Statute*) were subject to revision by the Commission. The distinction between such cases and the case at bar is fully covered by our discussion of the *Nixon case* and need not be repeated here.

(2)

The Court held that under the peculiar provisions of *Section 66*, a *Gas* corporation could initiate proceedings for a change of rate under that Section notwithstanding that the rate was established by *private* contract between the parties and that a *Gas* corporation need not proceed under Section 72, corresponding with Section 49, relating to Railroad corporations. The Commission here, consistent with the opinion of this Court in the *Wichita case*, *supra* (260 U. S. 48), held that not only did it not have jurisdiction to change a rate agreed upon under express statutory authority, but that in the case of *Railroads*, unlike *Gas* corporations, the application must be made under Section 49 and could not be made by merely filing new schedules under Section 29 (See Opinion and Order of Commission, our earlier brief, pages 68-69).

In this connection it is important to *contrast* the provisions of Section 66 relating to *Gas* corporations, under which the *Hempstead case* and the *Pavilion case* arose, with those of Sections 28 and 29 relating to *Railroads*. For that purpose we set forth in an **Appendix** to this brief in parallel columns the applicable provisions of Sections 28 and 29 relating to *Railroads* as contrasted with those of subdivision 12 of Section 66 relating to *Gas* corporations.

The *contrast* between those sections of the Law shows that the Legislature in this and in other respects enacted

entirely different provisions with respect to *Gas* corporations, on the one hand, and *Railroad* corporations on the other. *There is no provision requiring Railroads to file their contracts with the Commission, as there is with respect to Gas corporations.* Having been thus filed, the Commission, by the express terms of Section 66, is given authority to act under Section 66 with respect to the contracts so filed, but that authority, conferred with respect to *Gas* corporations is withheld with respect to *Railroad* corporations.

Accordingly, in the case of Gas corporations, the Utility (in the case of *private* contracts) is expressly authorized ***to initiate proceedings*** for an increase under Section 66 not only in connection with a non-contractual but in connection with a contractual rate of fare. In the case of Railroad corporations these provisions were, apparently intentionally, omitted from Section 29 and a Railroad corporation *is therefore not authorized to initiate proceedings under Section 29 with respect to a contractual rate of fare, private or otherwise* (*Wichita Railroad & Light Corporation v. Public Utilities Commission of Kansas*, supra).

Indeed, it would be anomalous if it were otherwise, since Contracts establishing the rate *are not required to be filed with the Commission in the case of Railroad corporations* (Sections 28 and 29) as they are in the case of Gas corporations (Section 66). If the Railroad corporation were permitted to initiate proceedings under Section 29 to be released from a contractual rate merely by filing new schedules the Commission would not even know whether or not the rate was contractual and, if so, who the other contracting party was. It would not know whether the other party to the Contract might not object to the proposed change, as it probably would. Where, however, as in the case of Gas corporations, *all contracts are required to be filed*, the Commission, upon

the filing of amendatory schedules, is in a position to know whether the new rate affects the rights of other parties who desire to be heard concerning any change in a contractual rate.

At pages 102 and 103 of the Interborough's brief the following appears:

> "The Commission states (Brief, pp. 17-19) that by the Public Service Commissions Law 'two methods are provided by which a carrier may initiate proceedings for an increased rate,' first, under Section 49, and second, under Section 29."

This quotation is misleading unless read in connection with the sentence from which this clause has been plucked (our earlier brief, pages 17-19):

> "It will thus be observed that in cases properly within its jurisdiction *and in the absence of contract*, two methods are provided by which a carrier may initiate proceedings for an increased rate, but that in both cases the Commission remains in full control of the rate to be charged."

We insist, therefore, that under the decision of this Court in the *Wichita case*, the Commission, *even under State law*, was required to deny the plaintiff's application under Section 29, upon that ground alone, even if the Contracts were subject to its jurisdiction.

(3)

These decisions, instead of sustaining, completely demolish the Appellee's contention on this aspect of the case, because the rule declared by those decisions *has been changed by Statute subsequently enacted* (March 30, 1921), which incorporated into the *Gas* Sections of the Law (Chapter 134 of the Laws of 1921) the very provisions which for upwards of fifteen years *had been contained in Section 29 applicable to Railroad corporations* (see *note*

to Section 66 at page 80 of the Appendix to the Interborough's brief). The *present* similarity, therefore, between the Railroad and Gas Sections of the Law is, therefore, the result of Amendments introduced into the Gas Sections *after* the institution of the proceedings in the *North Hempstead case* and in the *Pavilion Gas case and as a direct result thereof*. Section 29 applicable to Railroads on the contrary, for fifteen years (Chapter 250, Laws of 1914), has contained these very provisions *which were thus added to the Gas Sections* in consequence of the proceedings in the cases above referred to, which had revealed a weakness in the *Gas* Sections of the Law.

At the time, therefore, that the *Hempstead* and *Pavilion* cases arose the general powers of the Commission with respect to Gas corporations (Section 72) only authorized the Commission to act concerning an *existing* rate. *Unlike Section 29, Section 66 contained no provisions authorizing the Commission to act with respect to amendatory schedules before they became effective.* Notwithstanding that the procedure was declared to be "defective and illogical" (*North Hempstead case*, page 450), the Court was constrained to hold that because the Sections of the Law applicable to Gas corporations did *not* contain the provisions applicable to Railroad corporations, a Gas corporation could file amendatory schedules effective after thirty days and that the Commission was powerless to act *until after the schedules had taken effect* because no other construction of Section 66 was possible

> "without doing violence to the plain language of the statute"

but that

> "*after rates are established by the filing of schedules*, a review thereof may be had on complaint under the Public Service Commission Law (Sections 71, 72)."

The same conclusion was applied in the *Pavilion Gas Company* case, where the Court said (page 151):

> "A *Gas* company has the legal right to increase its rates and make the increase effective thirty days after filing with the Commission its schedule of new rates."

The Dates Now Become Important.

The amendatory schedules in the *North Hempstead* case *were filed by the Gas Company to become effective on February 20, 1920* (Record on Appeal, Court of Appeals, page 17). This further appears from the opinion of the Court of Appeals (page 447), where it is said that the appeal is taken

> "from an order of the Appellate Division of the Supreme Court *entered July 27, 1920*,"

The amendatory schedules in the *Pavilion Gas Company* case (Record on Appeal, Court of Appeals, page 15) *were filed on February 7, 1920.* This also appears from the opinion of the Court of Appeals (page 148):

> "On August 12, 1919, the gas company filed a petition with the public service commission, for leave to raise the rates to seventy-five cents. Hearings were had upon the application from time to time until *February 7, 1920*, when the gas company filed with the commission a schedule of rates increasing the rates then existing to eighty-five cents per thousand cubic feet, with a discount of ten per cent. for prompt payment, *same to take effect March 10, 1920. The commission, on the 15th of April following* [*1920*], *instituted this proceeding.*"

The Amendments of subdivision 12, Section 66, were introduced into the Public Service Commission Law by Chapter 134 of the Laws of 1921, *enacted March 30, 1921.*

This distinction—between the sections relating to *Gas* corporations, at the time the suits were instituted in the *North Hempstead case* and in the *Pavilion Gas Company case*, and Section 29, relating to *Railroad* corporations—was stated as follows in *Public Service Commission* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285; aff'd. 226 N. Y. 580:

> *"The Public Service Commissions Law* **now** *contains a provision as to* **railroad** *companies by which a proposed increase of rates may be suspended by the Commission so that the increase will not take effect until the Commission has after hearing and investigation determined whether the proposed increase is proper and should go into effect.* (See Consol. Laws, chap. 48 [Laws of 1910, chap. 480], §29, as amd. by Laws of 1914, chap. 240.) *There is no such provision as to* **gas** *companies, and under the statutes as they* **now** *stand it is the right of the* **gas** *company to increase its rates and make the increase effective thirty days after filing with the Commission its schedule of new rates."*

The statements, therefore, at pages 92 and 93 of the Interborough's brief that

> *"The effect of these provisions [Section 29] was construed and applied by the Court of Appeals with respect to the similar provisions* contained in subdivision 12 of Section 66 of the Public Service Commissions Law relating to the rights of gas and electric corporations in Town of North Hempstead v. Public Service Commission"

and that

> *"Section 29* of the Public Service Commissions Law *is* in every respect *the same* in its procedural provisions as subdivision 12 of Section 66"

will mislead unless the situation is clearly understood because, although the *procedural* provisions of Section 29

and subdivision 12 of Section 66 are substantially the same *at the present time,* they differed in vital respects *at the time of the institution of the proceedings in the North Hempstead case and in the Pavilion Gas Company case.* The very purpose of the Amendments of March 30, 1921, was to authorize the Commission to take the same action with respect to amendatory schedules filed under Section 66 as under Section 72, by making Section 66 correspond with Section 29, applicable to Railroad Corporations.

It follows, that under the provisions of Section 29 the Commission has the same power of supervision and action with respect to schedules filed by Railroad corporations *that it has under Section 49* and that no amendatory schedule thus filed could have become effective unless the Commission so decided.

PART III.

THE RATE OF FARE.

It is impossible, on account of the limited time at our command, to analyze all the figures contained in the Interborough's brief. It is only possible to refer to certain legal questions which are involved.

I.

Whatever may be the rule in the ordinary case the plaintiff, on account of the conditions upon which it secured and now holds the City's property, is not entitled to more than a fair return upon its actual investment therein.

There is no substantial dispute (Interborough brief, page 131; our earlier brief, pages 190-191) that the Interborough is earning a reasonable and much more than reasonable return on its original investment. It is argued, however (Interborough brief, page 115), that for rate-making purposes it is entitled to a return based upon the *present* value of its leasehold and not upon its *original* investment.

Whatever may be the rule in the ordinary case with respect to the rate base, it is not applicable here because the plaintiff secured and may only continue to hold the City's property under the stipulations of the lease.

In *Manufacturer's Railway Co.* v. *United States*, 246 U. S. 457, the same conditions appeared. There the Railway had leased property from the City of St. Louis under an Ordinance which limited the rate (page 463). In valuation proceedings before the Interstate Commerce Commission it was contended that the Railway was entitled to earn a fair return upon this leasehold based upon the actual value of the lease. This Court held, however, that it was to be presumed that *the grant of the excess value was*

to the public, not to the Railway, and that accordingly the Railway might not include such excess value as an asset upon which it was entitled to earn a fair return. The Court said (page 496):

> "The lease from the City to the Railway is not in the printed transcript, but the substance of the ordinance authorizing it is stated. It granted authority to construct, maintain, and operate tracks upon land of which a considerable part constituted a public wharf. *If the stipulated rental is less than the fair annual value of the property it is to be presumed that the grant of the excess was to the public, not to the private interest of the Railway.* We are at a loss to see upon what principle a presumed annual value of the leasehold *in excess of the stipulated rent can be capitalized as assets of the Railway* for the use of which in commerce the public is required to pay tolls. This would give to the lease the effect of converting public property, *pro tanto,* into private property."

II.

The value of the Interborough Company's interest is limited by the City's rights of recapture, notwithstanding that those rights have not yet been exercised.

It is said that the value of the plaintiff's lease is not affected by the Recapture provisions of Contract 3 and of the Certificate because the right of Recapture has not been exercised. The answer is that where *the value of the plaintiff's interest* is the subject of inquiry, that value is affected by every contract provision as well as by every other consideration which affects the value of the interest so to be determined. Every burden imposed upon the lessee either by the lease or by extraneous conditions reduces *pro tanto* the value of the lease.

Here the lessee's interest is affected and reduced by a provision which accords to the City a right of tremendous importance with respect to the property which is the subject of the lease and which to that extent reduces the value of the lease to the lessee. This is true even though that right has not ripened into a reality. If we consider what the lease could be sold for in the open market, assuming that it could be sold, it becomes apparent that the Recapture provisions would constitute practical limitations on the value of the lease because every purchaser would consider the effect of those provisions and refuse to pay more than the Recapture price today, for property that might be Recaptured tomorrow. The *right* of Recapture, therefore, on the one hand and the necessity of *submitting* to Recapture on the other are thus seen to limit the value of the lease even though that right has not been exercised. If it were necessary to determine the value of a building, would not the Court consider the insecurity of its foundations even if the building had not yet fallen down.

The question will naturally suggest itself and is suggested (Interborough brief, pages 111-112): How does such a rule operate where the lessee's interest is constantly diminishing and may soon expire with the expiration of the term? Is the lessee's interest to be reduced accordingly and, if so reduced, *is the public entitled to service free of charge?*

The answer is that the *combined value* of all the estates in the property will always be equal to the value of the entire property and that, to the extent that the lessee's interest is reduced by burdens imposed under the lease, the value of the lessor's interest is augmented. *The two combined represent the total value of the property* upon which the rate is estimated. But the interest of the lessee

is not the value of the property but the fair value of his lease; the interest of the lessor is the value of the property *minus* the value of the lease.

Matter of Daly, 29 App. Div. 286;
Taylor v. *State*, 124 N. Y. Suppl. 818;
Matter of Pier 39, 62 App. Div. 271; aff'd 168 N. Y. 254;

and other cases cited at page 193 of our earlier brief. It follows that the value of the plaintiff's interest cannot fairly be determined by ignoring the essential conditions of the lease which diminish or augment the value of its interest in the property.

This is illustrated by *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, referred to at page 193 of our earlier brief. In that case the City of Boston laid a public street over a plot of land of which the Chamber of Commerce owned the fee and over which the Wharf and Wet Dock Corporation had an easement of way, light and air. Except for a mortgagee, these two were the only parties having interests in the land. Together with the mortgagee they filed an agreement that the damages might be assessed in a lump sum, and upon the City refusing to assent to the agreement, they contended that it was their right as a matter of law, under the Massachusetts statute and the 14th Amendment of the United States Constitution, to recover together the full value of the land taken. All parties agreed that if the petitioners were correct in this the damages should be assessed at $60,000, and, if not, the damages should be only $5,000. Affirming all the Courts below, this Court held that the City was correct in its contention that each party having an interesst in the land *was entitled only to compensation for its interest*, and that since Wharf and Wet Dock Corporation, the owner of the easement, had lost nothing by the act of the City in taking the property

for a public street, which the Corporation might use in common with the public, it was entitled to no compensation whatever.

This Court by Holmes, *J.*, said, at page 194:

> "The only question to be considered is whether when a man's land is taken he is entitled by the 14th Amendment to recover more than the value of it as it stood at the time."

Continuing, the Court said:

> "It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 435. *But the Constitution does not require a disregard of the mode of ownership*—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. *It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained.* We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement. See *Bartlett* v. *Bangor*, 67 Maine 460, 468. *Walker* v. *Manchester*, 58 N. H. 438, 441. *Gamble* v. *Philadelphia*, 162 Pa. St. 413. *Matter of Adams*, 141 N. Y. 297. *Olcan* v. *Steyner*, 135 N. Y. 341, 346. *Crowell* v. *Beverly*, 134 Massachusetts 98."

Where, therefore, *one party* representing a particular interest in the property appeals for protection against alleged confiscation, *it must appear that that party is not receiving an adequate return upon the fair value of the interest in the property which he represents.*

Conclusion.

The Order appealed from should, we submit, be reversed and, since no cause of action is stated, the Complaint should be dismissed. If any reversal be upon the ground that no Federal jurisdiction exists or that this suit was instituted before any cause of action had accrued, this would permit the suits in the State Courts, the prosecution of which has been enjoined *but which are still pending*, to proceed. The New York Courts would then be in a position to determine any questions of law presented by the statutes and decisions of New York State.

Respectfully submitted,

SAMUEL UNTERMYER,
IRWIN UNTERMYER,
CHARLES DICKERMAN WILLIAMS,
Counsel.